80-2168

No.

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

PHILIP T. MEDICO,

Petitioner

v.

TIME, INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION OF PHILIP T. MEDICO FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1981

PHILIP T. MEDICO,

Petitioner

v.

TIME, INC.,

Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals, in effect, erroneously recognizes a constitutional privilege of neutral reportage of newsworthy events which, if affirmed, would permit in private figure libel actions the invocation of such a constitutional privilege even where a state's common law conditional privilege of fair reporting of official governmental documents is clearly inapplicable?

2. Whether the ruling of the Court of Appeals for the Third Circuit, implicitly recognizing such a constitutional privilege of neutral reportage, improperly disregards the holding of this Court in *Gertz v. Robert Welch, Inc.*, erroneously resurrects the previously abandoned doctrine of *Rosenbloom v. Metromedia, Inc.*, and improperly adopts the conflicting rationale of the Court of Appeals for the Second Circuit as set forth in the decision of *Edwards v. National Audubon Society, Inc.*?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Justices of the Supreme Court of the United States:

The petitioner, Philip T. Medico, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 2, 1981 and which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania granting a summary judgment in favor of Time, Inc.

OPINIONS BELOW

1. The opinion of the Court of Appeals for the Third Circuit is reported at 643 F. 2d 134 (3d Cir. 1981) and is reproduced at page A1 of the Appendix to this Petition.

2. The opinion of the District Court for the Eastern District granting the renewed motion of Time, Inc. for summary judgment is unreported and is reproduced on page A45 of the Appendix to this Petition.

3. The opinion of the District Court for the Eastern District denying the initial motion of Time, Inc. for a summary judgment is unreported and is reproduced at page A38 of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 2, 1981. A timely petition for rehearing with a suggestion for rehearing in banc was filed on March 13, 1981. Said petition for rehearing was denied on March 27, 1981; however, Judge Hunter opposed said denial and expressed the view that a rehearing should have been granted. This petition for certiorari was filed within ninety (90) days of the date of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which reads in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

Said constitutional provision is made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

This is a libel action based upon diversity jurisdiction in which the plaintiff, Philip T. Medico, petitioner herein, a Wilkes-Barre, Pennsylvania businessman, seeks general and punitive damages from the defendant, Time, Inc., for certain defamatory references to him made in the March 6, 1978 issue of Time Magazine.

The overall focus of the article in question was on the suspected criminal activities of then Congressman Daniel J. Flood of Pennsylvania. The article was entitled "Opening the Floodgate" and opened with a generally critical discussion of the administration of the United States Department of Justice and of the asserted ineptitude of certain of its senior officials in directing criminal investigations. The article then proceeded to a discussion of certain of the several criminal investigations of Congressman Flood's activities that were then being conducted by the Justice Department and other Federal authorities.

As examples of suspected misconduct, the Time article cited three matters as the subjects of ongoing investigations and referred to information supplied by Stephen Elko, a former Flood aide. The first of those three matters mentioned the plaintiff in the following portion of the article which is challenged in this action:

> Among the matters under scrutiny: Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino. The suspected link: the Wilkes-Barre firm of Medico Industries controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his

Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

The March 6, 1978 issue of Time had a world-wide circulation exceeding four million copies.

Time initially moved for summary judgment in June of 1979 on the sole basis that the defamatory statements relating to the plaintiff were substantially true. In support of its motion Time submitted the affidavit of John Danahy, a former FBI official, and two documents—an FBI report on "La Cosa Nostra, Philadelphia Division" and a personal profile report on Philip Medico—both of which documents Danahy could only characterize as resembling those in the files of the FBI during his employment there some eleven (11) years earlier. Both documents state that an "informant" alternately code-named "PH T-3" and "PH 591-C*" had identified Medico as a close associate of Russell Bufalino and a "capo" or "capodecina" in La Cosa Nostra. The affidavit recites that La Cosa Nostra is the FBI's term for the Mafia, and that the "informant" was not a person but an electronic listening device by means of which a recording had been made. Prominently displayed on the FBI report is a legend which calls attention to the special nature of the FBI document. That legend reads as follows:

> This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

Nowhere in the Danahy affidavit or in any of the FBI documents is there any specific identification as to who conducted the electronic surveillance or who identified the participants in any overheard conversations or who re-

corded and transcribed any such conversations. More importantly, nowhere within the text of the FBI documents themselves is there the slightest indication that Russell Bufalino ever described Philip Medico as a Mafia chief or participated in any way in an overheard or recorded conversation.

In further support of its initial motion for summary judgment, Time also submitted the affidavit of one Sandy Smith, identified therein as a correspondent employed by Time since 1967. Smith in his affidavit asserts that he supplied the factual information used to prepare the Time article which is the subject of this action. Smith asserts further that he had knowledge of the information contained in the FBI documents identified by Danahy. Smith stopped short of asserting, however, that he had ever seen those FBI documents or that those documents were the source of any information known by him and supplied to Time. Finally, the Smith affidavit contains no assertion whatever, predicated on the FBI documents or otherwise, that Russell Bufalino ever described Philip Medico as a Mafia chief or participated in any way in an overheard or recorded conversation.

The counter-affidavit submitted by the plaintiff denies any connection on his part with the Mafia.

The District Court construed the substance of the Time article as asserting that the FBI had recorded Russell Bufalino's identification of the plaintiff as a Mafia chief. In doing so, the District Court recognized that the identity of the person allegedly overheard by FBI agents was an essential element of the defamatory assertion. The District Court denied the initial motion for summary judgment on the basis that the Danahy affidavit lacked personal knowledge on the part of the affiant both as to the authenticity of the FBI documents and as to the truth of the assertions made therein. However, the District Court's

denial of the motion was made expressly without prejudice to the right to renew the motion on the basis of a more competent affiant.

In January of 1980 Time again moved for summary judgment, again on the sole basis of the substantial truth of the Time article in question. Time resubmitted the two FBI documents it had presented to support its initial motion, supplemented with affidavits of two other former FBI agents. One affiant, David Breen, had supervised an investigation of organized crime that the FBI's Philadelphia Office had conducted. Breen stated that the Philadelphia office had prepared the report on La Cosa Nostra at his direction and that the plaintiff's personal profile card had been maintained and prepared by the FBI. Breen further stated that, based upon his personal experience with the FBI, he knew from the code names assigned the "informant" that the information in the documents was derived from a tape-recording made by means of an electronic listening device and transcribed by trained individuals capable of identifying the voices of the persons recorded. The other affiant, Patrick Collins, also served in a supervisory position with the FBI and confirmed Breen's interpretation of the documents. However, neither of these affidavits made any pretense of asserting any personal knowledge as to the identity of the participants in any overheard or recorded conversation.

On this second occasion, the District Court granted Time's motion for summary judgment but not on the basis of the truth defense advanced by Time. On this latter issue the District Court found that a genuine issue of fact existed as to whether the FBI ever overheard or recorded Russell Bufalino describing the plaintiff as a Mafia chief. However, after declining to hold for Time on the truth theory, the District Court granted the summary judgment on the basis of the common law conditional privilege ac-

corded the press to republish fair and accurate accounts of official proceedings. Stated otherwise, the District Court, after refusing to find that the FBI in fact had ever overheard or recorded Russell Bufalino describing the plaintiff as a Mafia chief, concluded that the FBI documents nevertheless did make such an assertion. The District Court thus considered the Time article in question to be a fair and accurate account of those FBI documents. Accordingly, the publication was held to be privileged and summary judgment was awarded in favor of Time.

On appeal to the Third Circuit Court of Appeals from the granting of the summary judgment, the plaintiff argued the inapplicability of the conditional privilege of fair reporting of official governmental documents. Time, on the other hand, continued to advance the defense of truth and alternately relied upon the applicability of the said conditional privilege. The Court of Appeals in its Opinion did not address the issue of the substantial truth of the Time article. Rather, it affirmed the granting of the summary judgment on the ground that the record established beyond any question the applicability of the Pennsylvania common law privilege of fair reporting.

In concluding that the Time article was a fair and accurate account of the FBI documents in the record, the Court of Appeals expressly conceded that an essential element of the Time article was the assertion that Russell Bufalino was the person overheard and recorded. However, as heretofore noted, nowhere within the four corners of the FBI documents themselves is there the slightest indication that Russell Bufalino ever described Philip Medico as a Mafia chief or participated in any way in an overheard or recorded conversation. The only support found in the record for that alleged fact is the unexplained and hearsay assertion contained in certain of the affidavits accompanying the FBI documents; but no such

corresponding factual assertion is made in the governmental reports themselves. On this state of the record, the Court of Appeals in its Opinion stopped short of finding that the FBI documents themselves indicate that the person overheard was Russell Bufalino. Nevertheless it concluded that the Time article, was a fair and accurate report of those FBI documents. In doing so the Court of Appeals indicated that its conclusion, as to the applicability of the Pennsylvania common law privilege of fair reporting of governmental documents, was influenced by its belief that the trend of federal case law is toward the recognition of a constitutional privilege of neutral reportage of newsworthy events.

The instant petition for a writ of certiorari follows the denial by the Court of Appeals of a petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Third Circuit Court of Appeals, in Its Only Reasonable and Meaningful Interpretation, Raises the Important Question as to the Existence of a Constitutional Privilege of Neutral Reportage of Newsworthy Events in Libel Actions Where the Common Law Conditional Privilege of Fair Reporting is Manifestly Inapplicable.

In affirming the granting of the summary judgment in favor of Time, the Court of Appeals for the Third Circuit articulated its decision solely in terms of the applicability of Pennsylvania's common law privilege of fair reporting. That determination was made in the context of an implicit agreement between the parties that the substantive law of Pennsylvania should govern this diversity action, that the Time article in question was clearly defamatory in nature and that the only substantial issue involved in that appeal was whether the said publication was privileged.

Petitioner maintains that despite the express language of the Opinion of the Court of Appeals, said Opinion could not be predicated, on any reasonable and meaningful basis, upon the Pennsylvania common law conditional privilege of fair reporting. Both the Opinion of the Third Circuit and the applicable legal authorities cited therein make it eminently clear that the fairness and accuracy of a media report must be judged against the government document which is the subject of the report. *Hanish v. Westinghouse Broadcasting Co.*, 487 F. Supp. 397 (E. D. Pa. 1980); *Mathis v. Philadelphia Newspapers Inc.*, 455 F. Supp. 406, 415 (E. D. Pa. 1978); *Sciandra v. Lynett*, 409 Pa. 595, 600, 187 A. 2d 586, 589 (1962); *Restatement (Second) of Torts*, Section 611 (1977). See page A11, note 17 of Appendix hereto. In other words, a report should

not be considered as fair or accurate if its substance is not reflected in any way in the government document which is the subject of that report.

As noted, nowhere on the face of the text of the FBI documents themselves is there the slightest indication that Russell Bufalino ever described Philip Medico as a Mafia chief or participated in any way in an overheard or recorded conversation. Thus the Pennsylvania common law conditional privilege of fair reporting is manifestly inapplicable to a media report that ascribes such an interpretation to those documents. Petitioner contends, therefore, that despite the express language of the Opinion of the Third Circuit, one must attribute its conclusions to a legal principle other than the privilege of fair reporting.

In attempting to analyze the Opinion of the Third Circuit, some insight is gained from the Court's references to the possible application of a constitutional privilege of neutral reportage:

> Constitutional considerations also help resolve the present dispute. Although the Supreme Court has never explicitly recognized a constitutional privilege of fair report, several of its recent decisions point toward that result. While we need not decide today whether the First Amendment requires a privilege for the press to report on official acts and proceedings regardless of whether they contain defamatory information, we find that analysis of the constitutional issues reinforces our prediction that Pennsylvania would, as a matter of common law, apply the fair report privilege to Time's publication about Medico (See Pages A20 and A21 of Appendix hereto).
>
> • • •
>
> We are careful to point out that we do not decide at this time that the First Amendment immunizes a newspaper's republication of a defamation arising in

> connection with a matter of public interest, and originally authored by a government source. But we believe that the solicitude that both the Supreme Court and other federal tribunals have expressed for the press in such circumstances might well influence the Pennsylvania Supreme Court's application of its common law privilege of fair report.[20] The trend of federal case law strengthens our belief that the Pennsylvania Court, if confronted with the question, would find the Time article that Medico challenges within the ambit of the privilege. (See page A26 of Appendix hereto) (Footnote omitted)

Accordingly, in view of the manifest inapplicability of the common-law privilege of fair reporting, it seems logical to conclude that the Third Circuit gave some weight to the suggested existence of a constitutional privilege of neutral reportage. In doing so, the important unsettled question of the existence and nature of such a constitutional privilege is raised.

The rationale of the emerging doctrine of neutral reportage, when recognized, has been based upon the public interest in the dissemination of media reports concerning newsworthy matters and involving controversial issues. *Edwards v. National Audubon Society, Inc.*, 556 F. 2d 113, 120 (2d Cir.), cert. denied, 434 U. S. 1002 (1977). The infant doctrine, when its application has been approved, promotes the publication by the media of newsworthy statements made by others regardless of whether the media affirmatively believes the statements to be true. Under this view, the function of the media is to act as a conduit to pass on newsworthy matters and not to assess their accuracy or truth. As it was articulated by the Second Circuit in *Edwards v. National Audubon Society, supra*, at page 120:

> Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and distinterested reporting of those charges, regardless of the reporter's private view regarding their validity. . . . What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Although the holding in *Edwards v. National Audubon Society, supra,* was limited to newsworthy statements made concerning public figures, the rationale, as previously noted, was not so limited and extended to all newsworthy statements about public controversies Accordingly, the doctrine of neutral reportage would presumably extend to the republication of newsworthy statements about matters suspected or known to be false and would encompass statements that are not necessarily contained in official governmental records or proceedings. To that extent then the doctrine of neutral reportage would provide additional constitutional protection to the media where the defenses of truth and the privilege of fair reporting would provide no relief. See R. Sack Libel, Slander and Related Problems, § III. 6.1 et seq., pages 144-151.

To that extent also the said doctrine might explain the somewhat ambiguous decision of the Third Circuit in the instant case in granting a summary judgment. If the decision below was in fact influenced by the recognition of a constitutional privilege of neutral reportage, then the correctness of that decision is open to serious question, both as to the existence of such a constitutional privilege and as to the applicability of any such privilege to the facts of this case.

With reference to the existence of a constitutional privilege of neutral reportage, there is substantial authority to the effect that the law should not encourage republication of falsehoods in order to give the media more constitutional protection in the republication of newsworthy statements than is received by the original publisher. Thus the concept of the doctrine of neutral reportage has been rejected expressly and in its entirety by the Third Circuit in a decision which is seemingly in conflict with the decision of that Court in the instant case. *Dickey v. C. B. S. Inc.*, 583 F. 2d 1221, 1225 (3d Cir. 1978). Under this view, in libel actions the public or private character of the plaintiff is pivotal and determines the constitutional protection afforded. A public official or public figure can recover if the media knew that the republished defamatory statement was false or was aware of its probable falsity. *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967). A private person can recover if the appropriate degree of fault—usually negligence—is found. *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974).

It is respectfully submitted, therefore, that the doctrine of neutral reportage should not be recognized. To do so would be to give constitutional protection to media reports if they meet the test of being "newsworthy", a

test that was abandoned by this Court in *Gertz v. Robert Welch Inc., supra.*

Moreover, even if a constitutional privilege of neutral reportage is recognized, there is a serious question as to its applicability to the facts at hand. Clearly the neutral reportage doctrine can apply only when the media republishes a newsworthy statement that in fact was made. It cannot apply if the media report is unreliable or fabricated. Nowhere in the record of the instant case does it appear that the assertion made by Time—that *Russell Bufalino* described Philip Medico as a Mafia Chief—reflected a statement actually made by Russell Bufalino and even so reported by the FBI. As the Opinion of the Third Circuit points out, the Time article may reasonably be understood to be based upon FBI materials. See page A11, note 17 of Appendix hereto. However, those FBI materials nowhere on their face indicated that Russell Bufalino ever described Philip Medico as a Mafia chief. Thus it would appear that even the invocation of the suggested doctrine of neutral reportage cannot support the granting of the summary judgment in this case by the Third Circuit.

For these reasons, and in order to preserve the balance which this Court has struck between the First Amendment guarantees of freedom of speech and the press and the individual's right to the protection of his own good name, the petitioner respectfully requests the grant of certiorari to review the judgment below.

II.

The Decision of the Third Circuit Court of Appeals, in Effect, Improperly Disregards the Decision of this Court in Gertz v. Robert Welch, Inc., Resurrects the Previously Abandoned Doctrine of Rosenbloom v. Metromedia Inc., and Improperly Adopts the Conflicting Rationale of the Court of Appeals for the Second Circuit in Edwards v. National Audubon Society, Inc.

The Decision of the Third Circuit in this case conflicts with other decisions within the Third Judicial Circuit and conflicts also with a decision of the Second Circuit on the same subject matter. These conflicts provide the second reason advanced by petitioner for the allowance of the writ.

The Third Circuit in *Dickey v. C. B. S. Inc., supra,* took the position that there is no value to free debate in false statements of fact; thus it was held that the republication of falsehoods would be protected only if made in the good faith belief in their truth or with due care, depending on the public or private nature of the plaintiff. *See R. Sack, Libel, Slander and Related Problems,* § III. 6.6 p. 149. Thus the Third Circuit in *Dickey v. C. B. S. Inc., supra,* at 1225-26 declined to create a constitutional privilege of neutral reportage and in doing so indicated that to recognize such a constitutional privilege for the media to report newsworthy events would be to resurrect the doctrine of *Rosenbloom v. Metromedia Inc.,* 415 F. 2d 892 (3d Cir. 1969), affirmed 403 U. S. 29 (1971), which doctrine was abandoned by this Court in *Gertz v. Robert Welch, Inc., supra.*

The view of the law as enunciated by the Third Circuit in *Dickey v. C. B. S. Inc., supra,* is in direct conflict with the law as had been previously expressed by the

Second Circuit in *Edwards v. National Audubon Society, Inc., supra,* where the doctrine of neutral reportage was given full recognition.

The Decision of the Third Circuit in the instant case seems to compound the already irreconcilable conflict between the Second Circuit and the Third Circuit. On the one hand, the Third Circuit in its Opinion seems to reaffirm its decision in Dickey which declined to create a constitutional privilege of neutral reportage. See page A25 of Appendix hereto. On the other hand, however, the Third Circuit at the same time discusses approvingly the doctrine as enunciated in *Edwards v. National Audubon Society, Inc.* and seems to attempt to reconcile its holding with that of the *Dickey* case. See pages A25-A26, note 38 of Appendix hereto.

It should be noted also that the Court of Appeals for the Tenth Circuit has also recognized the doctrine of neutral reportage but has limited its application to plaintiffs who are public officials or public figures. *Dixson v. Newsweek, Inc.,* 562 F. 2d 626, 631 (10th Cir. 1977).

It is respectfully submitted that these conflicts among the decisions of the federal courts of appeals—concerning the existence of a constitutional privilege of neutral reportage—particularly in view of the decision of this Court in *Gertz v. Robert Welch, Inc., supra,* present additional special and important bases for the exercise of this Court's discretion in the allowance of the requested writ.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2077

MEDICO, PHILIP T., *Appellant*

v.

TIME, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
C.A. No. 79-00597

Argued December 1, 1980

Before: ADAMS, GARTH, and SLOVITER, *Circuit Judges*

(Filed March 2, 1981)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This appeal from a summary judgment in favor of the defendant presents an important question concerning the law of defamation. We must review the district court's determination that a news magazine enjoys a privilege, under the common law of Pennsylvania, to publish a summary of FBI documents identifying the plaintiff as a member of an organized crime "family." We affirm.

I.

In its March 6, 1978 issue, Time magazine published an article describing suspected criminal activities of then-Congressman Daniel J. Flood. The article stated that Stephen Elko, a former Flood aide, had characterized the Congressman as a "muscler"—an official who used his considerable influence to direct federal contracts to individuals and companies that responded with cash. The article further stated that at least eight separate United States Attorneys' offices had undertaken investigations of Flood's activities.

As an example of suspected misconduct, the Time article listed the following:

> Among the matters under scrutiny: Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino, The suspected link; the Wilkes-Barre firm of Medico Industries, controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufa-

lino's description of Philip as a *capo* (chief) in his Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

Circulation of the March 6, 1978 issue of Time exceeded four million copies.

Following publication of the article, Medico instituted a defamation action against Time, Inc., in federal district court on the basis of diversity jurisdiction.[1] Medico alleged that the article's import was that he held a high position in an organized criminal society.

Time initially moved for summary judgment in June 1979. It asserted that the substance of the article was not that Medico actually participated in criminal activities, but only that FBI agents had recorded Russell Bufalino's description of Medico as a Mafia *capo*. Time argued that this latter statement was true. In support of its motion, Time submitted the affidavit of John Dahany, a former FBI official, and two documents—an FBI report on "La Cosa Nostra, Philadelphia Division," and a personal profile report on Philip Medico—which Dahany identified as official FBI documents. Both documents state that an "informant" alternately code-named "PH T-3" and "PH 591-C*" has identified Medico as a close associate of Russell Bufalino and a "capo" or "capodecina" in La Cosa Nostra. The affidavit states that La Cosa Nostra is the FBI's term for the Mafia, and that the "informant" was not a person, but an electronic listening device, by means of which a recording had been made.

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1. 28 U. S. C. § 1332(a) (1976). At the time he filed the complaint, Medico resided in Pennsylvania; Time, Inc., is incorporated under the laws of Illinois with its principal place of business in New York.

The district court agreed with Time that the substance of the allegedly defamatory article was that the FBI had recorded Bufalino's identification of Medico as an underworld leader. It concluded, however, that the supporting documents which Time submitted did not resolve all genuine issues concerning the truth of its report. Although the FBI documents corroborated the Time article, the court ruled that the affidavit Time had advanced to authenticate the documents was not based on the personal knowledge of the affiant, as required by Rule 56(e). The court therefore denied Time's motion for summary judgment.

In January 1980, Time again moved for summary judgment based on the substantial truth of its publication. Time resubmitted the two FBI documents it had proffered to support its initial motion, supplemented with affidavits of two FBI agents. One affiant, David Breen, had supervised an investigation of organized crime that the FBI's Philadelphia Office had conducted. He stated that the Philadelphia Office had prepared the report on La Cosa Nostra at his direction, and that Medico's personal profile card had been prepared and maintained by the FBI. Breen further stated that, based on his personal experience with the FBI, he knew from the code names assigned the "informant" that the information in the documents was derived from a tape-recording made by means of an electronic listening device and transcribed by highly trained individuals capable of identifying the voices of the persons recorded. The other affiant, Patrick Collins, also had served in a supervisory position with the FBI. He confirmed Breen's interpretation of the documents, primarily on the basis of his "general experience with similar such reports."

On this occasion the district court granted Time's motion for summary judgment, but not on the basis of

the truth defense. The court expressed doubt about its earlier conclusion that, in order to prevail on a truth theory, Time need only establish that FBI agents recorded Bufalino's description of Medico, rather than that Medico was in fact a Mafia chieftain. The court acknowledged that Pennsylvania law might require proof of the underlying assertion, but decided it did not have to resolve the issue; the court concluded that, whether the statement sued upon be given a broad or narrow scope, the evidentiary affidavits that Time submitted failed to establish the truth defense. Although the court found that the affidavits established the authenticity of the FBI report and personal file card as FBI materials, it also determined that neither affiant had personal knowledge of the "factual basis" for the documents. Neither Breen nor Collins had installed the listening device allegedly used in recording Bufalino's conversations, or had transcribed the recorded conversations, or had personal knowledge of the identity of all the participants in the relevant conversations.

After declining to hold for Time on the truth theory, the district court considered whether the Time article fell within the common law privilege accorded the press to report on official proceedings. The judge seemed troubled because Pennsylvania courts apparently had so far extended the privilege only to reports of proceedings open to the public, whereas Time had summarized reports which the FBI had kept secret and whose release to Time evidently had been unauthorized. But after an exhaustive analysis of Pennsylvania precedents, the court concluded that Pennsylvania courts, if presented with the question, would find summaries of non-public government reports within the privilege. The district judge then ascertained that the Time article represented a fair and accurate account of the FBI documents. Accordingly he held that the publication was privileged, and awarded summary judgment in favor of Time.

On appeal, Medico argues that the district court incorrectly determined that Time's publication was privileged under Pennsylvania law. Time counters that the district judge accurately construed the applicable state law on privilege, and contends further that the defense of truth applies and affords an alternate basis for affirming the district court. Our analysis of the district court's result will entail examination of the state law precedents regarding the fair report privilege, of the policies underlying them, and of Constitutional constraints on defamation law.[2]

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2. A threshold inquiry is which state's substantive law applies to this diversity action. The parties implicitly agree that Pennsylvania law governs, and the district court applied Pennsylvania law. Inasmuch as Pennsylvania has an interest in the outcome of this litigation—the target of the alleged defamation is a Pennsylvania resident and the issue of Time magazine containing the allegedly libelous article was circulated throughout the state—this Court has no cause sua sponte to challenge the choice of Pennsylvania law. *See* Steaks Unlimited, Inc. v. Deaner, 623 F. 2d 264, 269-70 (3d Cir. 1980); Pierce v. Capital Cities Communications, Inc., 576 F. 2d 495, 501-02 (3d Cir.), *cert. denied*, 439 U. S. 861 (1978).

Under Pennsylvania law, a defamation claim consists of two basic elements. First, the communication must be defamatory in nature and understood as such by the recipient. Corabi v. Curtis Publishing Co., 441 Pa. 432, 441-42, 273 A. 2d 899, 904 (1971); 42 Pa. Cons. Stat. Ann. § 8343(a)(1) to (4) (Supp. 1979). Before this court, Time does not dispute the defamatory nature of its statements concerning Medico. Second, the communication must be uttered maliciously—that is, intentionally or negligently and "without just cause or excuse." Corabi v. Curtis Publishing Co., 441 Pa. at 451, 273 A. 2d at 909; 42 Pa. Cons. Stat. Ann. § 8344 (Supp. 1979). This malice component is "implied or presumed to exist from the unprivileged publication of defamatory words actionable per se." Corabi v. Curtis Publishing Co., 441 Pa. at 451, 273 A. 2d at 909 (emphasis deleted). On this appeal, then, the sole issue is whether Time can negate the presumption of malice by establishing that its publication was privileged.

II.

The fair report privilege on which the district court relied developed as an exception to the common law rule that the republisher of a defamation was subject to liability similar to that risked by the original defamer.[3] Pennsylvania had adopted the republican rule by the turn of the century,[4] and no case brought to our attention suggests that Pennsylvania has abandoned it.[5] With this rule, the law indulged the fiction that the republisher of a defamatory statement "adopted" the statement as his own.[6] The common law regime created special problems for the press. When a newspaper published a newsworthy account of one person's defamation of another, it was, by virtue of the republication rule, charged with publication of the underlying defamation. Thus, although the common law exonerated one who published a defamation as long as the statement was true,[7] a newspaper in these

3. *See* W. Prosser, Handbook of the Law of Torts 798 & n. 13 (4th ed. 1971); Note, *Privilege to Republish Defamation*, 64 Colum. L. Rev. 1102, 1102 (1964).

4. *See* Oles v. Pittsburgh Times, 2 Pa. Super. Ct. 130, 142 (1896) ("One who . . . repeats a defamatory accusation is deemed to have published it, and is liable to action although he gives the name of the author."); Stepp v. Croft, 18 Pa. Super. Ct. 101 (1901).

5. *Cf.* Hoover v. Peerless Publications, Inc., 461 F. Supp. 1206, 1208 (E. D. Pa. 1978) (construing Pennsylvania law) (citing "the black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher").

6. *See* R. Sack, Libel, Slander, and Related Problems § II.6.1, at 86-87 (1980); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 262-63 (1976).

7. *See* Restatement (Second) of Torts § 581A (1977).

circumstances traditionally could avail itself of the truth defense only if the truth of the underlying defamation were established.[8]

To ameliorate the chilling effect on the reporting of newsworthy events occasioned by the combined effect of the republication rule and the truth defense, the law has long recognized a privilege for the press[9] to publish accounts of official proceedings or reports even when these contain defamatory statements. So long as the account

8. The following example is given in Oles v. Pittsburgh Times, 2 Pa. Super. Ct. 130, 142 (1896); if J. S. publishes that he heard J. A. say that J. G. was a traitor or a thief, then "J. S. must prove that J. G. was a traitor or a thief in order to make a complete defense."

Although the common law placed the burden of proving truth on the defendant, this allocation may run afoul of recently announced constitutional principles. *See* note 38 *infra*. Because we dispose of the present case on the basis of the fair report privilege, we have no occasion to resolve this constitutional issue, or to consider whether Pennsylvania courts would continue to apply the republication rule to a newspaper account of defamatory remarks, *see* Part VII & note 42 *infra*.

9. There is some dispute whether the privilege is available to non-press defendants. The *Restatement* suggests that "any person who makes an oral, written or printed report" on an official proceeding should have access to the defense. Restatement (Second) of Torts § 611, Comment c (1977). While some states adhere to this approach, *see* e.g., N. Y. Civil Rights Law § 74 (McKinney 1976); Ohio Rev. Code Ann. §§ 2317.04-05 (Page 1953); Okla. Stat. tit. 12, § 1443 (1971), other states grant the privilege only to specified press defendants, *see, e.g.*, Mich. Comp. Laws Ann. § 600.2911 (3) (West 1968) ("reporter, editor, publisher or proprietor of a newspaper"); N. J. Stat. Ann. § 2A-43-1 (West Supp. 1976) ("publication in any newspaper"). Although Pennsylvania, as far as we can tell, has not delineated the availability of the privilege, in light of the identity of defendant Time, Inc., we need not decide at this time whether Pennsylvania would allow non-media defendants to claim the fair report privilege.

presents a fair and accurate summary of the proceedings,[10] the law abandons the assumption that the reporter adopts the defamatory remarks as his own.[11] The privilege thus permits a newspaper or other press defendant to relieve itself of liability without establishing the truth of the substance of the statement reported. The fair report privilege has a somewhat more limited scope than the truth defense, however. So long as the speaker establishes the truth of his statement, he is shielded from liability, regardless of his motives; the fair report privilege, on the other hand, can be defeated in most jurisdictions by a showing that the publisher acted for the sole purpose of harming the person defamed.[12]

Unlike many states,[13] Pennsylvania has never codified the fair report privilege. In addition, while Pennsyl-

10. *See* Restatement (Second) of Torts § 611 (1977); W. Prosser, *supra* note 3, at 832.

11. *See* R. Sack, *supra* note 6, § VI.3.7, at 316 & n. 213. Analytically, the fair report privilege is similar to the truth defense. Both make verity the issue, although requiring that a report be fair and accurate may allow the press a somewhat greater margin of error than requiring that its report be true. In those cases where a plaintiff claims that republication of an official report defamed him *not* by conveying the underlying defamation, but by leading the reading public to believe that a government agency had leveled defamatory charges against him, the two defenses are effectively "merged." The common law defense of truth would turn on whether the government actors had in fact so charged the plaintiff, and the fair report privilege would focus on the some inquiry. *See* Sowle, *Defamation and the First Amendment: The Case for A Constitutional Privilege of Fair Report*, 54 N. Y. U. L. Rev. 469, 506-07 (1979).

12. *See* 1 F. Harper & F. James, The Law of Torts 450-56 (1953). For this reason, truth generally is referred to as an "absolute," and fair report as a "conditional," privilege. *See generally* Sack, *supra* note 6, § VI.1.

13. For examples of statutory versions of the privilege, see Col. Civ. Code § 47 (West 1954); Ga. Code Ann. § 105-704 (1978);

vania follows the *Restatement (Second) of Torts* on most matters,[14] the Pennsylvania Supreme Court evidently has not yet had occasion to comment on the *Restatement's* version of the fair report privilege. Earlier, however, the state courts had endorsed the privilege as set forth in the original *Restatement*,[15] and this edition was similar in most respects to the more recent one. We believe it appropriate to accept as the law of Pennsylvania the version of

13. (Cont'd.)
N. J. Stat. Ann. § 2A:43-1 (West Supp. 1978); N. Y. Civil Rights Laws § 74 (McKinney 1976); Ohio Rev. Code Ann. § 2317.04 (Page 1953); Wis. Stat. § 895.05 (1975). Application of the privilege varies from state to state. *See* Comment, *Constitutional Privilege to Republish Defamation*, 77 Colum. L. Rev. 1266, 1275 n. 72 (1977).

14. *See* Gilbert v. Korvette, Inc., 457 Pa. 602, 611 n. 25, 327 A. 2d 94, 100 n. 25 (1974) ("In recent years, this Court has not hesitated to adopt sections of the Restatement (Second) of Torts (1965) when our common-law precedents varied from the Restatement or when the Pennsylvania common law provided no answer.").

15. *See* Binder v. Triangle Publications, Inc., 442 Pa. 319, 324, 275 A. 2d 53, 56 (1971); Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 177, 191 A. 2d 662, 667 (1963); Sciandra v. Lynett, 409 Pa. 595, 600, 187 A. 2d 586, 589 (1962). Section 611 of the original Restatement of Torts provided:

> REPORTS OF JUDICIAL, LEGISLATIVE, AND EXECUTIVE PROCEEDINGS.
>
> The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is
>
> (a) accurate and complete or a fair abridgment of such proceedings, and
>
> (b) not made solely for the purpose of causing harm to the person defamed.

the fair report privilege embodied in the current *Restatement.*[16]

Section 611 of *Restatement (Second)* provides:

> Report of Official Proceeding or Public Meeting
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

With respect to the present controversy, the basic inquiry is whether Time's summary of FBI documents concerning Philip Medico is "a report of an official action or proceeding."[17]

The district court examined and rejected the possibility that the FBI reports in question are not "official"

16. *Accord,* Mathis v. Philadelphia Newspapers, Inc., 455 F. Supp. 406, 415 (E. D. Pa. 1978); *see* Hanish v. Westinghouse Broadcasting Co., 487 F. Supp. 397 (E. D. Pa. 1980) (assuming without elaboration that § 611 of *Restatement (Second)* represents the law of Pennsylvania).

17. Although the Time article did not explicitly credit the FBI Report on La Cosa Nostra or the FBI personal file card on Medico as the Magazine's sources of information, the statements about Medico, taken in context, may reasonably be understood to inform the reader that the story was based on FBI materials. The article should accordingly be regarded as a summary of a purportedly "official" government report. *See* Mathis v. Philadelphia Newspapers, Inc., 455 F. Supp. 406, 416 (E. D. Pa. 1978) (articles summarizing information supplied by Philadelphia Police Department were accounts of governmental reports and hence within Section 611, even though the articles did not expressly identify the Department as the source of the information); *cf.* R. Sack, *supra* note 6, § VI.3.7.5, at 325 (if the publication does not inform the reader of the identity or nature of the government proceeding, it probably is not a fair and accurate report).

because they are not generally available to the public. Medico does not challenge this reasoning on appeal, and we perceive no need to rehearse arguments that the district court has already canvassed. Medico contends before this Court that the FBI documents should not be deemed "official" because they express only tentative and preliminary conclusions that the FBI has never adopted as accurate. He points out that the title page to the FBI report on La Cosa Nostra bears the following legend: "This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency."

Neither the text of Section 611 nor the accompanying comments dispose of the issue Medico raises. Section 611 itself speaks only of "official" action or proceedings, without elaborating on when a statement is made in an official capacity. Comment d provides some support for locating the FBI documents concerning Medico within the scope of the privilege. That comment states: "The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege." In the present case, the FBI included its information on Medico in a report on the Philadelphia activities of the Mafia, and forwarded it for inclusion in a report on nationwide organized crime.

But another comment casts doubt on the applicability of the fair report privilege to the FBI materials. Comment h indicates that, while a report of an arrest or of the charge of crime falls within the privilege, "statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of [a] judicial proceeding or of the arrest itself and are not privileged." Because of the FBI's information con-

cerning Medico never led to an arrest or prosecution, the FBI materials may be thought to stem from such an early stage of official proceedings that the Section 611 privilege does not attach.

Pennsylvania cases predating the publication of *Restatement (Second)* also fail to resolve definitively whether summaries of criminal investigatory files fall within the privilege. The two cases most nearly on point, however, strongly support Time's defense. In *Sciandra v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963), the defendant newspaper had published three articles based on the "Reuter Report," a study, commissioned by then-Governor of New York, Averell Harriman, of the activities and associations of individuals who had attended a meeting of alleged organized crime figures.[18] The Pennsylvania Supreme Court held the newspaper's publication protected, announcing the fair report privilege in broad terms: "Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government." *Id.* at 600, 187 A. 2d at 588. As in the present case, there is no indication that the Reuter Report had led to the arrest or criminal prosecution of any suspected wrongdoer. The Reuter Report, however, bore stronger indicia of representing an "official" act than the FBI materials here: it was filed with the Governor and then released to the public, it evidently did not bear a legend indicating that it reached only tentative conclusions, and it resulted from an inquiry into the history and habits of organized crime figures that occupied New York State officials for several months. While *Sciandra* affords some basis for predicting that Pennsylvania would extend

18. Interestingly, one of the alleged crime figures examined by the Reuter Report is Russell Bufalino.

the fair report privilege to the publication challenged in this case, we doubt whether, standing alone, *Sciandra* disposes of this issue.[19]

A decision by a federal district court construing Pennsylvania law also supports application of the privilege to Time's publication. In *Hanish v. Westinghouse Broadcasting Co.*, 487 F. Supp. 397 (E. D. Pa. 1980), the court held that the privilege applied to a news report summarizing a civil complaint that contained defamatory accusations and that had formed the basis for a temporary restraining order.[20] The court approvingly quoted Justice Holmes' statement in *Cowley v. Pulsifer*, 137 Mass. 392 (1884), that "[i]f pleadings and other documents can be published to the world by anyone who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news"; the district court concluded nonetheless that, at least when some judicial action has been taken on a complaint, the fair report privilege applies.[21]

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19. Other Pennsylvania cases applying the fair report privilege cast little light on the question here, inasmuch as they involved reports of clearly official proceedings. *See* Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A. 2d 53 (1971) (account of proceedings in open court at criminal trial); Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A. 2d 662 (1963) (same).

20. Although the Court found the publication within the ambit of the privilege, it denied defendant's motion for summary judgment because it determined that plaintiff had raised a genuine issue of material fact concerning whether the publication fairly and accurately summarized the contents of the complaint.

21. Considerable controversy surrounds republication of defamations contained in pleadings on which no official action has been taken. Although Comment e to Section 611 of the Restatement excludes such pleadings from the scope of the privilege, Professor Eldredge writes that "the weight of authority is contrary to the

Assuming the court in *Hanish* correctly predicted Pennsylvania law, we think that decision supports application of the Section 611 privilege to the present case. FBI files seem at least as "official" as the pleadings in civil cases. Although civil complaints are instituted, for the most part, by private parties, the FBI documents concerning Medico were compiled by government agents acting in their official capacities. Moreover, the danger that a civil litigant will willfully insert defamatory assertions in his complaint generally would appear at least as great as the risk that a criminal investigatory agency will knowingly include false or malicious statements in its files. If Pennsylvania courts would grant the privilege to newspaper accounts of civil complaints on which a court has acted ex parte, we think it likely that they would grant the privilege to republication of defamatory items from the FBI materials on Medico.

III.

Three policies underlie the fair report privilege, and an examination of them provides further guidance for our decision today. Initially, an agency theory was offered to rationalize a privilege of fair report: one who reports what happens in a public, official proceeding acts as an agent for persons who had a right to attend, and informs

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21. (Cont'd.)

[*Restatement*] rule, and is that the report of pleadings filed in court which have not yet come before a judicial officer and upon which no judicial action has been taken comes within the privilege." L. Eldredge, The Law of Defamation § 79(b)(1), at 430 (1978). *Compare* Campbell v. New York Evening Post, 245 N. Y. 320, 157 N. E. 153 (1927) (reports of preliminary proceedings are privileged); American Dist. Tel. Co. v. Brinks, Inc., 380 F. 2d 131, 133 (7th Cir. 1967) (same), *with* Cowley v. Pulsifer, 137 Mass. 392 (1884) (report of preliminary proceedings not privileged).

them of what they might have seen for themselves.[22] The agency rationale, however, cannot explain application of the privilege to proceedings or reports not open to public inspection.[23]

A theory of public supervision also informs the fair report privilege. Justice Holmes, applying the privilege to accounts of courtroom proceedings, gave the classic formulation of this principle:

> [The privilege is justified by] the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

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22. Thus in Curry v. Walter, 126 Eng. Rep. 1046 (C. P. 1796), perhaps the earliest reported case recognizing the privilege, *see* Sowle, *supra* note 11, at 478, Chief Justice Eyre instructed the jury that it is not unlawful to publish "a true account of what took place in a court of justice which is open to all the world." The theory seems to be that because a member of the public could have witnessed the defamation, he is entitled to be informed of it. For an argument that the agency rationale confuses elements that justify republication with those that merely indicate when the privilege may exist, see Note, *supra* note 3, at 1116.

23. Courts still occasionally invoke the agency rationale, *see* Coleman v. Newark Morning Ledger Co., 29 N. J. 357, 387, 149 A. 2d 193, 209 (1959) (Weintraub, J., dissenting); Borg v. Boas, 231 F. 2d 788, 794 (9th Cir. 1956) (construing Idaho law). *See also* Restatement (Second) of Torts § 611, Comment d (1977) ("It is not clear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law.").

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884). The supervisory rationale has been invoked in the context of executive action as well.[24]

We believe the public supervision rationale applies to the present case. As public inspection of courtroom proceedings may further the just administration of the laws, public scrutiny of the proceedings and records of criminal investigatory agencies may often have the equally salutary effect of fostering among those who enforce the laws "the sense of public responsibility." For example, exploring the content of agency records may, in some cases, help ensure impartial enforcement of the laws.

We need not decide, however, whether the supervisory rationale is relevant to every republication of documents found in FBI files. For any general supervisory concern with respect to the FBI is heightened in the present case by the public interest in examining the conduct of individuals it elects to positions of civic trust. Elected officials derive their authority from, and are answerable to, the public. If the citizenry is effectively and responsibly to discharge its obligation to monitor the conduct of its government, there can be no penalty for exposing to general view the possible wrongdoing of government officials. Because the alleged defamation of Medico occurred in an article analyzing the conduct of former Congressman Flood, we believe it implicates this aspect of the supervisory rationale. Moreover, even though Time's publication arguably may have tarnished the reputation of Medico, a private individual,[25] as well as that of

24. *See* Note, *supra* note 3, at 1108-09.

25. We need not decide whether Medico is a "public figure" for constitutional purposes. Beginning with New York Times v. Sullivan, 376 U. S. 254, 279-80 (1964), the Supreme Court has required that "public officials" may not recover in actions for defamation unless they prove that the defendant published false material,

Representative Flood, the public has a lively interest in considering the relationships formed by elected officials.[26]

A third rationale for the fair report privilege rests, somewhat tautologically, on the public's interest in learning of important matters.[27] While "mere curiosity in the

25. (Cont'd.)
knowing of its falsity or with reckless disregard of the truth. The Supreme Court later extended this same protection to defendants in defamation suits brought by "public figures," Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967), a class the Supreme Court delineated more specifically on Gertz v. Robert Welch Publishing Co., 418 U. S. 323, 342-45, 351-52 (1974). Where the plaintiff is a "private figure," however, the First Amendment forbids states to impose liability without fault, but otherwise permits them to define for themselves the appropriate standard of liability. *Id.* at 347. Although Time argued, in connection with its initial summary judgment motion, that Medico was a public figure, Time withdrew this argument after the Supreme Court indicated in Hutchinson v. Proxmire, 443 U. S. 111, 120 n. 9 (1979), that the "actual malice" issue generally should go to the jury.

26. *See* Sowle, *supra* note 22, at 485-86.

27. *See* Note, *supra* note 3, at 1111-16. The Pennsylvania Supreme Court appeared to embrace this rationale in Sciandra v. Lynett, 409 Pa. 595, 600, 187 A. 2d 587, 588 (1963): "Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government." *See also* Barto v. Felix, 250 Pa. Super. Ct. 262, 267, 378 A. 2d 927, 929-30 (1977).

Some jurisdictions rely on the informational rationale to extend the privilege to accounts of the proceedings of public meetings of private, nongovernmental organizations, as long as the meeting deals with matters of concern to the public. *See* Barrows v. Bell, 73 Mass. (7 Gray) 301, 313 (1856); Pinn v. Lawson, 72 F. 2d 742 (D. C. Cir. 1934) (meeting of parish church board); Borg v. Boas, 231 F. 2d 788, 794-95 (9th Cir. 1956) (meeting calling on judge to convene grand jury). The British Defamation Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, § 7, extended the privilege to reports of

private affairs of others is of insufficient importance to warrant granting the privilege," [28] the present case does not involve such idle probing. The Time article discussed two topics of legitimate public interest. First, for the same reasons that support the supervisory rationale, examination of the affairs of elected officials is obviously a matter of legitimate public concern. In addition, as various federal courts have already recognized, there is significant public importance to reports on investigations of organized criminal activities,[29] whether or not these implicate government officials.

Because the Time article focused on organized crime, we think the informational rationale is especially relevant. The district court in the case at hand commented on the difficulty of gathering information pertaining to organized criminal activity: "Due to the size, sophistication and secrecy of most organized criminal endeavors, only the largest and most sophisticated intelligence-gathering entities can monitor them effectively. In practice this task has been taken up primarily by the Justice Department of the federal government and, in particular, by the FBI."

27. (Cont'd.)
"proceedings at any public meeting . . . bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern."

28. Note, *supra* note 3, at 1111.

29. *See* Miller v. News Syndicate Co., 445 F. 2d 356 (2d Cir. 1971); Time, Inc. v. Ragano, 429 F. 2d 219 (5th Cir. 1970); Wasserman v. Time, Inc., 424 F. 2d 920 (D. C. Cir.), *cert. denied*, 398 U. S. 940 (1970). During the short-lived regime of Rosenbloom v. Metromedia, 403 U. S. 29 (1971), which applied the *New York Times* standard to defamation actions arising out of reports on matters of public or general interest, courts frequently applied the "actual malice" requirement to actions based on accounts of organized criminal activities. *See* Taskett v. King Broadcasting, 86 Wash. 2d 439, 546 P. 2d 81, 100 (1976) (Horowitz, J., dissenting).

Indeed, the documents that Time summarized had been compiled by a government agency. In light of the difficulty in obtaining independent corroboration of FBI information, the press may often have to rely on materials the government acquires if it is to report on organized crime at all. We believe Time's publication of FBI materials mentioning Medico served a legitimate public interest in learning about organized crime.

Care must be taken, of course, to ensure that the supervisory and informational rationales not expand into justifications for reporting any defamatory matter maintained in any government file. Personal interests in privacy are not to be taken lightly, and are not to be overborne by mere invocation of a public need to know.[30] But we believe that the public interest is involved when, as here, information compiled by an enforcement agency may help shed light on a Congressman's alleged criminal or unethical behavior.

IV.

Constitutional considerations also help resolve the present dispute. Although the Supreme Court has never explicitly recognized a constitutional privilege of fair report, several of its recent decisions point toward that result. While we need not decide today whether the First Amendment requires a privilege for the press to report

30. The excesses of the McCarthy era, for example, prompted some commentators to point out the reputational injury the republication of official defamation can cause, and to advocate restricting the fair report privilege. *See* Pedrick, *Senator McCarthy and The Law of Libel: A Study of Two Campaign Speeches*, 48 Nw. U. L. Rev. 135 (1953); 13 Rutgers L. Rev. 723, 727 (1959). *See also* Coleman v. Newark Morning Ledger Co., 29 N. J. 357, 149 A. 2d 193 (1959) (serviceman previously unknown to public defamed by Senator McCarthy's summary of secret Congressional hearings; newspaper account held privileged.).

on official acts and proceedings regardless of whether they contain defamatory information, we find that analysis of the constitutional issues reinforces our prediction that Pennsylvania would, as a matter of common law, apply the fair report privilege to Time's publication about Medico.

Two cases from outside the field of defamation reflect the Supreme Court's recognition of the First Amendment value of reports of official proceedings. In *Cox Broadcasting v. Cohn*, 420 U. S. 469 (1975), the Court ruled that the First Amendment precludes a cause of action for invasion of privacy brought about by publication of the name of a deceased rape victim. The Court noted: "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Id.* at 495. In addition to these comments, which emphasize the informational rationale for the fair report privilege, the Court stressed the supervisory duties of the public: "The citizenry is the final judge of the proper conduct of public business. . . . With respect to judicial proceedings in particular, the function of the press serves . . . to bring to bear the beneficial effect of public scrutiny upon the administration of justice." *Id.* at 495, 492.

While *Cox Broadcasting* arose from a news report based on judicial records open to public inspection, the Court's commitment to dissemination of information of interest and value to the public seems just as apposite when, as here, the press reports on materials not open for inspection. Moreover, the Court in *Landmark Communications, Inc. v. Virginia*, 435 U. S. 829 (1978), extended the protective mantle of the First Amendment to a report of a proceeding closed to the public. The Court there held that a state may not impose criminal sanctions on those who publish information regarding proceedings

before a state judicial review commission, even when the state constitution and laws declare the proceedings confidential. The Court again stressed the need for public knowledge of the affairs of government: "'A major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' . . . Neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here. *Id.* at 838, 841 (quoting *Mills v. Alabama*, 384 U. S. 214, 218 (1966)). *Landmark Communications*, like *Cox Broadcasting*, does not strictly control the issue before us—for *Landmark* arose in the context of criminal sanctions,[31] rather than a defamation suit, and plaintiff in *Landmark* was a public official.[32] But in both *Cox Broadcasting* and *Landmark Communications*, the Supreme Court articulated the First Amendment value of reports that inform the public of the affairs of government and assist the citizenry in its supervisory duties. In *Cox Broadcasting* these values applied in the context of a damage action instituted by a private figure, and in *Landmark Communications* they could not

31. At least one commentator has remarked that "[t]he fact that the defendant in *Landmark* suffered a criminal sanction, as opposed to a civil liability for defamation, should have no bearing on the relevance to defamation law of the Court's reasoning." Sowle *supra* note 22, at 500. As the Supreme Court observed in New York Times v. Sullivan, 376 U. S. 254, 277 (1964), "the fear of damages awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."

32. Some language in *Landmark* suggests that the Court may have limited its reasoning to public officials; thus, the Court observed: "Our prior cases have firmly established . . . that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" 435 U. S. at 841-42 (quoting New York Times v. Sullivan, 376 U. S. 254, 272-73 (1964)).

be overcome by the confidentiality of the materials reported on.[33] Since we have found that the publication at issue here implicates these information and supervisory interests. *Cox* and *Landmark* provide a constitutional basis for applying a fair report privilege to a controversy which, like the present one, arises from a private figure's damage action for publication of reports not available to the public.

Closer to the facts in our case is *Time, Inc. v. Pape*, 401 U. S. 279 (1971), which some commentators have interpreted as elevating the fair report privilege into a constitutional requirement.[34] *Pape* arose from a Time magazine article that quoted excerpts from a Report of the United States Commission on Civil Rights. One section of the Report, dealing with police brutality, listed in detail allegations against Pape and other Chicago police officers contained in a civil complaint; Time quoted the allegations without citing the complaint, arguably making it appear that the allegations were factual findings of the Commission.

The precise issue presented to the Supreme Court was whether there was sufficient evidence for a jury to conclude that Time magazine, in omitting to mention that the charges of brutality were allegations of a complainant rather than findings of the Commission, had published material it knew to be false, or had acted in reckless dis-

33. *Cf.* New York Times Co. v. United States, 403 U. S. 713 (1971) (classified status of Defense Department study of Viet Nam War does not justify prior restraint of newspaper publication).

34. *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1362 n. 46 (1976); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation; Predictability and the New Synthesis*, 70 Mich. L. Rev. 1547, 1555 (1972); W. Prosser, *supra* note 3, at 832.

regard of the truth.[35] The Court observed that it is often possible to separate the question of the truth of the publication from the question of whether the publisher had an adequate basis for believing his publication true. 401 U. S. at 285. But not all cases are susceptible to this analysis: "A vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems." *Id.* at 285-86 (emphasis in original). After analyzing the Time article in light of the Commission Report, the Court concluded that Time had not engaged in a falsification sufficient to warrant a jury finding of actual malice.

While the fair report privilege was not at issue in *Pape*,[36] the Court's explicit recognition of the sensitive First Amendment problems that arise when the press publishes accounts of government reports and activities has not been lost on other federal courts. At least one

35. Pape did not challenge the findings of the district court that he was a "public official." *See* 401 U. S. at 284.

36. The way a plaintiff frames the allegations of defamation determines what factual allegations a truth defense requires. *See* W. Prosser, *supra* note 3, at 798. Pape did not allege that the "gist" or "sting" of the Time article was that he was guilty of brutality, but rather that Time defamed him by falsely asserting that the Commission charged that Pape was guilty of brutality. The case thus did not implicate the fair report privilege, since the object of the privilege—to put in issue the truth of the report that a third party defamed the plaintiff, rather than the truth of the underlying defamation—had been attained by virtue of how Pape framed his case. For a more thorough discussion, see Sowle, *supra* note 22, at 501-08.

court of appeals, citing *Pape,* has generalized this concern to create a constitutional privilege whenever the press republishes defamatory comments while reporting on newsworthy events. In *Edwards v. National Audubon Society, Inc.,* 556 F. 2d 113, 120 (2d Cir.), *cert. denied,* 434 U. S. 1002 (1977), the Second Circuit stated:

> When a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. . . . What is newsworthy about such accusations is that they were made. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Although this Court, in dicta, has declined to follow *Edwards, see Dickey v. CBS, Inc.,* 583 F. 2d 1221, 1225-26 (3d Cir. 1980), other federal courts have, as a matter of federal law, expressed reluctance to hold the press responsible for publication of defamatory statements originally uttered by others.[37] Moreover, the concerns underlying *Pape* and *Edwards* are heightened when the source of newsworthy defamation is a government official or report.[38]

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37. *See* Medina v. Time, Inc., 439 F. 2d 1129 (1st Cir. 1971); Oliver v. Village Voice, Inc., 417 F. Supp. 235, 238 (S. D. N. Y. 1976); Novel v. Garrison, 338 F. Supp. 977, 982-83 (N. D. Ill. 1971).

38. The news report at issue in *Dickey* involved a defamation originally uttered by a public official, but one speaking in a personal rather than in an official capacity. *See* 583 F. 2d at 1222-23. Plaintiff in *Dickey* admitted that he was a public figure and could prevail on his defamation claim only if he satisfied the *New York*

We are careful to point out that we do not decide at this time that the First Amendment immunizes a newspaper's republication of a defamation arising in connection with a matter of public interest, and originally authored by a government source. But we believe that the solicitude that both the Supreme Court and other federal tribunals have expressed for the press in such circumstances might well influence the Pennsylvania Supreme Court's application of its common law privilege of fair report.[39] The trend of federal case law strengthens our belief that the Pennsylvania Court, if confronted with the question, would find the Time article that Medico challenges within the ambit of the privilege.

V.

Once the libel defendant establishes the existence of a "privileged occasion" for the publication of a defamatory

38. (Cont'd.)
Times standard of "actual malice," *see* note 25 *supra*. The Third Circuit affirmed the district court's holding that plaintiff had failed to satisfy his burden of proof on this issue. *Id.* at 1227-29. The court's discussion of *Edwards v. National Audubon Soc'y, Inc.*, was thus irrelevant to its decision.

39. Since the Supreme Court's decision in New York Times v. Sullivan, 376 U. S. 254 (1964), Pennsylvania cases frequently have taken account of constitutional principles while fashioning common law rules of defamation law. The result is that "no rigid line of demarcation may be maintained between state law rules and constitutional norms, for both are intermixed in the Pennsylvania precedents." Pierce v. Capital Cities Communications, Inc., 576 F. 2d 495, 502 (3d Cir.), *cert. denied*, 439 U. S. 861 (1978). For an illustration, see Matus v. Triangle Publications, Inc., 445 Pa. 384, 395, 286 A. 2d 357, 362-63 (1971), where the Pennsylvania Supreme Court, following the decision on Rosenbloom v. Metromedia, Inc., 403 U. S. 29 (1971), engrafted onto Pennsylvania law the rule that the *New York Times* knowing or reckless falsity standard applies in a civil libel action brought by a private individual for

article, the burden returns to the plaintiff to prove that the defendant abused its privilege. *Sciandra v. Lynett*, 409 Pa. 595, 601, 187 A. 2d 586, 589 (1963). Pennsylvania recognizes two forms of "abuse": the account of an official report may fail to be fair and accurate,[40] as when the publisher overly embellishes the account, *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A. 2d 53, 56 (1971); *Sciandra v. Lynett*, 409 Pa. at 600, 187 A. 2d at 589; or the defamatory material may be published for the sole purpose of causing harm to the person defamed, *id.* Inasmuch as Medico does not allege that Time published its article for the purpose of harming him, the sole issue with respect to abuse of privilege is whether the district court erred in concluding that there was no genuine ques-

39. (Cont'd).
defamatory falsehoods uttered in a news broadcast about the individual's involvement in an event of public or general interest.

40. Placement on the plaintiff of the burden of demonstrating that a privileged report was not fair and accurate traditionally distinguished the fair report privilege from the truth defense, in which defendant bore the burden of proving truth, *see* Corabi v. Curtis Publishing Co., 441 Pa. 432, 449-50, 273 A. 2d 898, 908-09 (1971). After Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974), it is doubtful that a state can place the burden of proving truth on the defendant. *Gertz* held that a plaintiff in a defamation action must be required to demonstrate "fault" on the part of defendant, *id.* at 347, and rejected Justice White's suggestion, offered in dissent, that a publisher may be required to prove the truth of a defamatory statement concerning a private individual, *id.* at 347 n. 10. We have earlier questioned whether Pennsylvania's placement of the burden of proving truth on the defendant survives *Gertz*, *see* Steaks Unlimited, Inc. v. Deaner, 623 F. 2d 264, 274 n. 49 (3d Cir. 1980), and at least one member of the Pennsylvania Supreme Court has expressed similar reservations, *see* Moyer v. Phillips, 462 Pa. 395, 341 A. 2d 441, 447 (1975) (Roberts, J., concurring). *But see* Eaton, *supra* note 33, at 1381-86, 1429 (*Gertz* tolerates common law rule of presuming falsity of defamatory publication, and placing on defendant burden of proving truth).

tion whether Time's publication fairly and accurately summarized the FBI materials concerning Medico.

We agree with the district court that nothing in the record suggests that the Time article unfairly or inaccurately reported on the FBI materials. Medico asserts that Time's failure to mention the legend on the FBI report on the Philadelphia Branch of La Cosa Nostra renders its story unfair. No similar legend, however, appears on the FBI's personal file card on Medico, which is an independent source of the information reported. Moreover, nothing in the Time article expresses a "recommendation" or "conclusion" on the part of the FBI concerning Medico's participation in Mafia activities. The article simply says that FBI "agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family."

Medico also insists that, because the FBI files identify the "informant" only by a code name, it is impossible to ascertain whether Time's summary was accurate. But the uncontradicted affidavits of Breen and Collins establish that the code names refer to electronic listening devices that the FBI planted in the Philadelphia area. Time has accurately portrayed the FBI records as indicating that Medico has been identified as part of the Bufalino crime family.

VI.

Medico further contends that Time can avail itself of the fair report privilege only if it actually based its article on the FBI materials; if the report reflects the contents of the official materials merely by coincidence, the privilege does not attach. Medico maintains there is a genuine issue of fact whether Time employees worked with the FBI materials in preparing the article.

Pennsylvania law squarely contradicts this argument. In *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275

A. 2d 53 (1971), a newspaper printed an allegedly libelous article that purported to summarize testimony at a criminal trial. The reporter who wrote the article had not attended the trial, however, but had based his story on information supplied by persons who had attended. The Pennsylvania Supreme Court held the story was nonetheless privileged. It said: "How a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question." *Id.* at 327, 275 A. 2d at 58. In the present case, then, how Time magazine obtained its knowledge of the FBI materials is irrelevant under the law of Pennsylvania.[41] The article is privileged as a fair and accurate summary of the FBI materials.

VII.

We conclude that Time's publication of an allegedly defamatory article concerning Philip Medico falls within the scope of the Pennsylvania common law privilege of

41. Medico cites Kilian v. Doubleday & Co., 367 Pa. 117, 79 A. 2d 657 (1951), as establishing that, in order to be privileged as true or as a fair report, a defamatory statement must be based on the personal observations of the speaker. Medico's reliance is misplaced. In *Kilian*, the author had written his story in the first person; although he based his portrayal of events on the reports of other people, he wrote the story as though he had witnessed the events himself. Thus, his story carried "the verisimilitude naturally to be expected from the author's statement that he himself witnessed such occurrences, as distinguished from assertions made on the basis of hearsay." Under these circumstances, the Pennsylvania Supreme Court indicated that the defendant could prevail on his truth defense only by establishing the events related. By contrast, the authors of the Time article made no claim to have heard the FBI recordings they reported. *Kilian* does not sugges that a defense of truth or privilege requires that the story be based on personal observations of the author, when the account makes no claim to first-hand knowledge.

fair report, and that Medico has failed to establish a genuine issue of fact concerning a possible abuse of the privilege. We therefore find it unnecessary to address Time's alternative argument for affirmance: that the affidavits it submitted establish the substantial truth of its publication. In particular, we need not examine the issue, left unresolved by the district court, whether under Pennsylvania law repetition of another's words relieves the press of the need to prove the truth of the underlying assertion as long as it accurately ascribes all it says to the original utterer.[42]

The judgment of the district court granting Time's motion for summary judgment will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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42. The possible interpretations of Time's publication about Medico may be used to illustrate the different approaches to the truth defense. The Time article is subject to at least three constructions:

A. Medico is a Mafia *capo*.

B. Government agents overheard Bufalino describe Medico as a Mafia *capo*.

C. FBI records indicate that government agents overheard Bufalino describe Medico as a Mafio *capo*.

Under the fair report privilege, the accuracy of C relieves Time of liability. If the privilege did not apply, however, we would have to ascertain whether Pennsylvania law would exonerate Time on the basis of the truth defense if Time established the truth of B, or whether Time would have to prove A. In light of our holding that Time's publication comes under the fair report privilege, we need not dispose of this question. In addition, we need not review the district court's determination that Time has failed to demonstrate the truth of either A or B.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-2077

PHILIP T. MEDICO,

Appellant

v.

TIME, INC.

On Appeal from United States District Court for
Eastern District of Pennsylvania
Civil Action No. 79-00597

PETITION FOR REHEARING

Now, comes the plaintiff-appellant, within fourteen (14) days after the entry of the opinion and judgment in which this Honorable Court affirmed the judgment of the district court granting the summary judgment in favor of Time, Inc., defendant-appellee, and respectfully submits this, his motion for rehearing, pursuant to and in accordance with Rule 40 of the Rules of Appellate Procedure and the Supplementary Rules 21 and 22 of the Rules of this Honorable Court and other applicable procedural rules, and in support thereof respectfully represents as follows:

1. The petitioner is Philip T. Medico, plaintiff-appellant.

2. The appeal in this cause was argued before this Court on December 1, 1980.

3. On March 2, 1981 this Court rendered its opinion in favor of the defendant, Time, Inc., and against the plaintiff, Philip T. Medico, affirming the judgment of the district court which granted the motion of Time, Inc. for summary judgment.

4. This petition is submitted in good faith and not for purposes of delay.

5. Petitioner respectfully requests a re-hearing in the above-entitled cause, either before this Court in banc or a division thereof, and further requests that the above-mentioned decision of this Court be vacated and a judgment entered overruling the judgment of the district court and denying the motion for summary judgment.

6. The above-mentioned Opinion of this Court explains the public interest that is served by affording to the press a privilege of fair reporting of governmental documents and of other official events, and the inadvisability of requiring the press to prove the actual truth of every detail of such a report. However, this appeal does not challenge said privilege but is based rather upon the defendant's failure to establish that material portions of the article in question (particularly as to whether Russell Bufalino was overheard describing the plaintiff as a capo) accurately reflect the contents of the FBI documents produced, and also that the author of the article in any way drew upon said FBI documents as a source. This failure is implicitly recognized in the aforesaid Opinion when this Honorable Court stops short of finding that the FBI records show that the person overheard was Russell Bufalino (Opinion, Page 26).

7. The specific grounds upon which petitioner seeks such a rehearing of this cause are as follows:

a. The above-mentioned Opinion of this Court does not respond to appellant's contention that a triable issue of fact exists as to the meaning of the FBI documents in question, particularly as to who may have been overheard describing the plaintiff as a Mafia capo. Moreover, the record presents no competent evidence, based upon personal knowledge, either in the FBI documents or otherwise, as to the identity of the person so overheard. Thus although the Opinion of this Court recognizes that an essential element of the defamatory assertion is the identity of the person overheard by FBI agents (Opinion, Page 26 and Page 28, note 42), it grants a summary judgment without requiring the defendant to establish, on the basis of personal knowledge, how the FBI document involved is interpreted to identify the person overheard as Russell Bufalino. Any assertions in affidavits to that effect outside the FBI documents and not based upon personal knowledge of its meaning, are irrelevant to the applicability of the fair report privilege.

b. Nowhere in the record does it appear that the author of the article in Time Magazine drew upon the specific FBI materials produced as a source (See Appendix, 52a-54a). Moreover, the mentioned Opinion of this Court seems to recognize that the record suggests a genuine issue of fact as to whether Time employees were actually attempting to report on the specific FBI materials produced (Opinion, Page 27). The Opinion seems to conclude, however, that this consideration is irrelevant to the applicability of the fair report privilege and cites *Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 275 A. 2d 53 (1971). It is respectfully submitted that the *Binder* case is inapplicable to the instant matter. In the *Binder* case it was undisputed that the defamatory assertion had been extracted from the testimony at a public criminal trial. Although the manner of gathering the information was in

issue, the source of the statement in the *Binder* case was undisputed; on the other hand the source of the Time article published in the instant case is very much in issue.

c. The above-mentioned Opinion of this Court expressly recognizes that this cause presents important questions concerning the fair report privilege in the Pennsylvania law of defamation (Opinion, Page 2), some of which questions had no clear precedent in cases applicable to Pennsylvania law.

d. The above-mentioned Opinion of this Court seems to detract from the uniformity of decisions both within the Third Judicial Circuit as well as in the other Circuits since on the one hand it seems to reaffirm its decision in *Dickey v. CBS, Inc.*, 583 F. 2d 1221, 1225-26 (3d Cir. 1980) which declined to create a constitutional privilege of fair reporting of newsworthy events as had been done by the Second Circuit in *Edwards v. National Audubon Society, Inc.*, 556 F. 2d 113, 120 (2d Cir.) cert. denied, 434 U. S. 1002 (1977); and in doing so this Court indicated that to grant a privilege to the press to report newsworthy events would be to resurrect the doctrine of *Rosenbloom v. Metro Media, Inc.*, 415 F. 2d 892 (3d Cir. 1969), affirmed 403 U. S. 29 (1971), which doctrine was abandoned by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974). On the other hand, however, the Opinion of this Court seems to express the belief that the Supreme Court of Pennsylvania, if confronted with this issue, would follow the principles set forth in the *Edwards* case, supra, and not the principles enunciated by this Court in the *Dickey* case, supra.

8. In accordance with Rule 22 of the Rules of the United States Court of Appeals for the Third Circuit, the statement of counsel attached hereto and marked Exhibit A is incorporated herein by reference and made a part hereof.

Wherefore, for the foregoing reasons, petitioner prays that a rehearing be granted, either before this Honorable Court in banc or a division thereof, and that the judgment of this Court heretofore entered on March 2, 1981 be vacated; that a judgment be entered overruling the judgment of the district court and denying the motion for summary judgment, all in accordance with the provisions of law and controlling authorities.

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Dated: March 13, 1981

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2077

PHILIP T. MEDICO,

Appellant

v.

TIME, INC.

On Appeal From United States District Court for
Eastern District of Pennsylvania
Civil Action No. 79-00597

STATEMENT OF COUNSEL PURSUANT TO RULE 22 OF RULES OF UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

Charles J. Bufalino, Jr., makes the following statement as counsel for petitioner:

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance concerning the applicability of the fair report privilege in the Pennsylvania law of defamation as affected by constitutional principles.

CHARLES J. BUFALINO, JR.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2077

PHILIP T. MEDICO,
Appellant

v.

TIME, INC.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF PENNSYLVANIA
Civil Action No. 79-00597

PROOF OF SERVICE

I hereby certify that on March 13, 1981, two (2) copies of the foregoing Petition for Rehearing were served upon the following, in the manner specified:

PETER HEARN
M. DUNCAN GRANT
RICHARD W. FOLTZ, JR.
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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-597

PHILIP T. MEDICO

v.

TIME, INC.

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J. August 30, 1979

This is a libel action premised upon diversity jurisdiction. Defendant Time, Inc. has moved for summary judgment, on the sole basis that the statements published in Time Magazine concerning the plaintiff are substantially true.[1]

The basic evidentiary facts of the case appear to be undisputed. Plaintiff Philip Medico is the president of Medico Industries, Inc. in Wilkes-Barre, Pennsylvania. A large part of Medico Industries' revenues since the mid-1960's has come from government contracts with the Pentagon, primarily for the production of rocket warheads and component parts. Time Magazine is distributed through-

1. Time, Inc. has withdrawn its alternative basis for summary judgment; namely, that plaintiff was a "public figure" and that Time, Inc. acted without "actual malice" under the doctrine of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964) and its progeny. The reason for withdrawing this claim is *Hutchinson v. Proxmire*, 47 U. S. L. W. 4827 (U. S. Supreme Court, June 26, 1979).

out the United States and many other countries. The worldwide circulation of the March 6, 1978 issue, containing the allegedly defamatory article, was well in excess of four million copies. The article, entitled "Opening the Floodgate," discussed the possible impending indictment of United States Congressman Daniel Flood, and cited several matters under investigation concerning Representative Flood. One such matter concerned the possible relationship between Representative Flood and reputed "Rackets Boss Russell Bufalino," with plaintiff and Medico Industries described as the "suspected link" between the two. The challenged portion of the article reads:

> Among the matters under scrutiny:
>
> Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino. The suspected link: the Wilkes-Barre firm of Medico Industries, controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

It has long been recognized that there can be no libel where the statement sued upon is true. Restatement (Second) of Torts § 558(a). Before the truth of the allegedly libelous statements can be determined, however, it must first be determined just what the substance of those statements actually is. In this case, the parties disagree as to the defamatory implications of the article. Plaintiff contends that the article amounted to an unquali-

fied characterization of him as "an official of an international criminal society . . . engaged in organized criminal activities." Defendant argues that, at the very worst, the article simply stated that the plaintiff had been *described by Russell Bufalino* as such, in a tape-recorded conversation. I agree with the defendant, that the question is not whether the characterization was accurate, but whether the alleged statements were in fact spoken by Bufalino and recorded by FBI agents.

The scope of the article, and of the specific challenged paragraph, is very carefully circumscribed. The article no more purports to unequivocally label Philip T. Medico as a Mafia chief than to characterize Representative Flood as actually having criminally participated in the events set forth. It describes simply the early stages of an investigation expected to culminate with Representative Flood's indictment. It speaks in terms of "possible cases" and matters under investigation, not of proven facts. It identifies, with reasonable specificity, the source or manner of origin of each piece of information. The particular paragraph referring to the plaintiff is carefully entitled a "matter under scrutiny." In it, Medico Industries is described only as a "suspected link" between Representative Flood and Russell Bufalino, and the article asserts no more than that FBI agents have recorded a conversation in which Russell Bufalino referred to the plaintiff as a *capo* or Mafia chief. These are limited allegations, and the test of their truth will be correspondingly limited. To ignore such limiting language would severely handicap the press in the accurate and responsible coverage of matters of substantial public interest: it would effectively confine the press to the reporting of proven or otherwise incontrovertible facts.

If defendant can prove that FBI agents did in fact record Russell Bufalino's description of the plaintiff as a

capo or Mafia chief, the article would have stated the truth and thus, even if otherwise defamatory, would not be actionable.

The complaint in this case alleges in general terms the complete falsity of the Time article. In connection with this motion for summary judgment, however, defendant has filed an evidentiary affidavit by former FBI agent John Danahy, in support of the assertion that FBI agents did in fact record Bufalino's description of the plaintiff as a Mafia chief. Plaintiff himself has filed an opposing affidavit raising the possibility of numerous questions of law and fact, but nowhere specifically denying the existence of the tape-recording.

It is well-settled that when a motion for summary judgment is supported by proper evidentiary affidavits, the opposing party cannot rest upon the allegations of his complaint, but must respond with specific facts showing the existence of a genuine issue for trial. If he does not, undisputed statements contained in the movant's affidavit are taken as true. *See, e.g., Smith v. Saxbe,* 562 F. 2d 729 (D. C. Cir. 1977); *Stevens v. Barnard,* 512 F. 2d 876 (10th Cir. 1975). If the Danahy affidavit is valid and authentic, therefore, it would be appropriate, for purposes of this motion, to regard as true the assertion that Bufalino's comment was tape-recorded by FBI agents. As a result, plaintiff's libel action could not succeed, and summary judgment would have to be entered in favor of defendant.

Affidavits in support of summary judgment must, according to Federal Rule of Civil Procedure 56(e), be based upon the personal knowledge of the affiant, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Where these requirements are not met, the affidavit should be disregarded in ruling

upon the motion. *Rochambeau v. Brent Exploration, Inc.*, 79 F. R. D. 381 (D. Colo. 1978).

The substance of the Danahy affidavit is contained in documents attached thereto, identified in the affidavit as photocopies of authentic FBI records. The documents identify the plaintiff as a "capo" in the upper Pennsylvania group of "La Cosa Nostra," on the basis of information obtained by means of an electronic listening device. In the affidavit, Danahy states his belief that the tape-recording upon which the documents are based would by now have been destroyed pursuant to normal FBI document retention procedures.

The problem with this affidavit, however, is that Mr. Danahy is unable personally to authenticate the documents. He stopped working for the FBI more than eleven years ago and is now director of security for the National Football League. The only capacity in which he purports to authenticate these documents, then, is as a former FBI agent, familiar at one time with the Organized Crime Program and with agency files on individuals in Lucerne County, Pennsylvania. He states simply that the documents physically resemble those used by the FBI during his employment there and that the substance of the documents is consistent with his recollection of facts and events occurring upwards of eleven years ago. There is no suggestion that Mr. Danahy played any part in the preparation of these documents, or that he ever saw them in FBI files. It is nowhere intimated that he had personal knowledge of FBI wiretapping procedures, the particular wiretap that yielded Bufalino's comment about the plaintiff, or the comment itself. The only possible personal connection between the affiant and the subject matter of this case is his rather ambiguous statement that, at one time, he "worked with" files on individuals in Lucerne County, Pennsylvania. It is not clear from this statement, how-

ever, that he ever examined the contents of any such file on Philip Medico, Russell Bufalino or any individual reputedly involved in organized crime in upstate Pennsylvania.

Clearly, the Danahy affidavit fails in all respects to satisfy the requirements of Rule 56(e). It is therefore appropriate to disregard it in considering and ruling upon the present motion for summary judgment.

Without the Danahy affidavit, there remain substantial questions of fact concerning the truth of the allegedly defamatory statements. Defendant's motion for summary judgment, insofar as it is based on the defense of truth, must therefore be denied. Such denial is, however, without prejudice to defendant's right to renew the motion at a later date, in the event that further discovery should suggest a more competent affiant or other suitable means by which these documents may be properly authenticated or by which the facts contained in them may otherwise be irrefutably established.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 79-597

PHILIP T. MEDICO

v.

TIME, INC.

ORDER

It is ORDERED that defendant's motion for summary judgment upon the grounds of the defense of the truth of the allegedly libelous statements herein sued upon is hereby DENIED without prejudice, in accordance with the foregoing memorandum opinion.

By THE COURT:

DONALD W. VANARTSDALEN, *J.*

Dated: August 30, 1979.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 79-597

PHILIP T. MEDICO

v.

TIME, INC.

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, *J.* June 25, 1980

Plaintiff claims in this libel action that an article in the March 6, 1978 issue of Time Magazine erroneously labeled him as an underworld criminal figure. The magazine defends on the basis of the substantial truth of the article, and for the second time in this litigation, moves for summary judgment upon that issue. The motion will be granted, not on the basis of the truth of the statements contained in the article, but because the statements were privileged.

The article in question discussed the possible impending indictment of United States Congressman Daniel Flood. It stated that Congressman Flood had been characterized by his former aide, Stephen Elko, as "an official who used his considerable influence to direct federal contracts to people and companies that said 'thank you' in cash." It stated that a congressional investigation into Congressman Flood's activities was expected, and that investigations "by at least eight separate U. S. Attorneys' offices" were already under way. It then outlined three

specific instances of suspected misconduct by Congressman Flood, the first of which concerns the present plaintiff. The challenged portion of the article reads:

> Among the matters under scrutiny: Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino. The suspected link: the Wilkes-Barre firm of Medico Industries, controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

THE DEFENSE OF TRUTH

In mid-1979, defendant Time Magazine moved for summary judgment on the issue of the substantial truth of the allegedly libelous material. In support of that motion, defendant submitted several affidavits, including the affidavit of John Danahy, a former FBI agent. Attached to the Danahy affidavit was a typed report on the subject of "La Cosa Nostra; Philadelphia Division," as well as a personal profile card on Philip Medico, both of which the affidavit purported to identify as official FBI documents. Both documents state that Philip Medico has been identified by an "informant" alternately code-named "PH T-3" and "PH 591-C*" as a close associate of Russell Bufalino and a "capo" or "capodecina" in La Cosa Nostra. The affidavit stated that La Cosa Nostra is the FBI's term for Mafia, and that the "informant" was not a person, but was in fact an electronic listening device, by means of which a

recording had been made. By memorandum opinion and order dated August 30, 1979, I denied the defendant's motion for summary judgment, primarily because the Danahy affidavit was not based on the personal knowledge of the affiant as required by Federal Rule of Civil Procedure 56(e). That denial was expressly made without prejudice to defendant's right to renew its motion in the event that further discovery should suggest a more competent affiant.

In the course of the August 30 opinion, I concluded that the test of the truth of the allegedly defamatory statements would be a narrow one. Defendant would be required to prove, as the article cautiously and plainly states, only that FBI agents tape-recorded Bufalino's description of the plaintiff as a Mafia chief, not what plaintiff refers to as the "underlying assertion"—that he held "an official position in an international criminal society and was engaged in organized criminal activities." In his response to the present motion, plaintiff challenges this conclusion, arguing that under Pennsylvania law, "repetition of another's words does not relieve one of the responsibility of proving the truth of the underlying assertion even if he accurately ascribes all he says to the original utterer." Plaintiff's brief at 8, *citing Mathis v. Philadelphia Newspapers, Inc.*, 455 F. 2d 406 (E. D. Pa. 1978); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A. 2d 899 (1971). While there may well be merit to this contention, I do not find it necessary to address the issue at this time, since, as will be discussed *infra*, the new evidentiary affidavits submitted in conjunction with this motion are insufficient to resolve the truth issue, regardless of whether the statement sued upon is given broad or narrow scope.

There are two affidavits now submitted in support of defendant's renewed motion for summary judgment. Both are by former FBI officials, and both purport to establish,

by means of the same two documents previously submitted in conjunction with the Danahy affidavit, that FBI agents did in fact record Russell Bufalino's description of the plaintiff as a Mafia chief. One of the affiants, David Breen, states that from 1962 to 1972 he was in charge of an ongoing organized crime investigation conducted by the Philadelphia office of the FBI, and that at the same time he was in charge of all related electronic surveillance. He states that the La Cosa Nostra report was prepared in the Philadelphia FBI office at his direction and under his supervision, and that the personal profile card was prepared at his direction and kept in files maintained by the FBI.[1] He states that he knows, from his experience with the FBI and his familiarity with the code names assigned to the "informant," that the information in the documents was derived from a tape-recording made by means of an electronic listening device and transcribed by highly trained individuals capable of identifying the voices of the persons so recorded. The other affiant, Patrick Collins, also in a supervisory position with the FBI, confirms Breen's interpretation of the documents, primarily on the basis of his "general experience with similar such reports," and his familiarity with the practice and procedure of the FBI. He states that while he was in charge of the FBI's national organized crime program in New York City, he received a copy of the Philadelphia report prepared by Breen and used it in preparing a national report on La Cosa Nostra for 1971. As to the personal profile card, he avers simply that he once saw it in FBI files.

I conclude that these affidavits present a wholly insufficient basis for the entry of summary judgment on the issue of truth. It is true that the factual allegations con-

1. It does not appear to be contested here that the documents were prepared at the times that the documents themselves state: *i.e.*, the report in 1971 and the card in 1965.

tained in the affidavits are uncontroverted, except by general denials made by plaintiff in his complaint and reiterated in his present affidavit and responsive brief. Moreover, as noted in my August 30 memorandum opinion, such general denials are ordinarily unavailing against specific factual allegations contained in a movant's affidavit. *See, e.g., Tunnell v. Wiley,* 514 F. 2d 971 (3d Cir. 1975); *Smith v. Webb,* 420 F. Supp. 600 (E. D. Pa. 1976). But this court must also recognize the difficulty that plaintiff would have in specifically controverting these particular factual allegations. It would be a challenging task indeed for him to "prove a negative" in this case, *see Mathis, supra,* 455 F. Supp. at 414; *Corabi, supra,* 441 Pa. at 449, 273 A. 2d at 908-09, *i.e.,* by establishing that FBI agents have *never* tape-recorded Russell Bufalino describing Philip Medico as a Mafia chief. As a practical matter, the only denial that the plaintiff can make is a general denial.

This practical consideration must be viewed in light of the fact that, in Pennsylvania, the burden of proof on the issue of truth rests with the defendant, not the plaintiff. It has been announced by both the legislature and the courts of this state that it is for the defendant to prove the truth of the statement, rather than for the plainiff to prove its falsity. *See* 42 Pa. C. S. A. § 8343; *Corabi, supra,* 441 Pa. at 449, 273 A. 2d at 908. *Cf. Herbert v. Lando,* 441 U. S. 153, 175 (1979) (noting recent judicial trend toward shifting burden of proof on truth issue from defendant to plaintiff). In other words, the falsity of the defamatory statement should be presumed. *Corabi, supra.*

A related consideration springs from federal procedural law. Under Rule 56 of the Federal Rules of Civil Procedure, material submitted in support of a motion for summary judgment must be viewed in the light most favorable to the opposing party. *Adickes v. Kress & Co.,* 398

U. S. 144, 157 (1970). The opposing party is entitled to the benefit of all reasonable doubts and inferences that may arise in connection with the motion. *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F. 2d 127, 131 (3d Cir. 1978).

In whatever light the present affidavits are viewed, they are sufficient to establish the authenticity of the attached documents as official FBI materials. Both affiants state that they are former FBI officials who, through personal acquaintance with the documents in question, are able to identify them as official FBI records maintained in the ordinary course of FBI activity.

However, even granting the authenticity of the documents, and assuming arguendo that they would be admissible into evidence at trial, I am of the opinion that a firmer factual foundation than this is necessary to establish the truth of the publication and thus to justify the granting of summary judgment in this case. Neither affiant appears to have any personal knowledge of the factual bases for the proffered documents. Even the one affiant who claims to have directed and supervised the preparation of one of the documents professes no personal awareness of the source of the information contained therein, and gives no indication that he actually participated in the gathering of that information. No affidavit has been presented by any individual who actually installed the electronic listening device allegedly used, who actually monitored it, who produced or was ever personally aware of a tape-recording made from it, who actually transcribed such a tape-recording, or who was personally aware of the identity of all the participants in any relevant conversation so recorded and capable of accurately attributing speech among them. Thus, there is no information on the present record from which this court can make any conclusive finding as to the truth of the allegedly defamatory state-

ments contained in the FBI documents. Inasmuch as the plaintiff has repeatedly and specifically denied that he is a "capodecina" in La Cosa Nostra—he has raised a significant factual issue as to the likelihood that the FBI ever recorded anyone uttering such a description of him. The conclusion that this dispute is sufficient to prevent summary judgment upon the issue of truth is inescapable, when defendant's affidavits, replete with factual gaps and displaying only a partial basis in direct personal knowledge, are weighed against all the presumptions and inferences to which a non-moving libel plaintiff is entitled.

THE DEFENSE OF PRIVILEGE

Among the possible defenses to an action for defamation, the Restatement includes, in addition to the defense of truth, a number of different common-law privileges, conditional as well as absolute. One such conditional privilege is entitled "Report of Official Proceeding or Public Meeting," and provides as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts § 611.

The Pennsylvania Supreme Court has not yet expressly adopted this provision, although it has adopted its direct predecessor, section 611 of the original Restatement. *See Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A. 2d 662 (1963); *Sciandra v. Lynett*, 409 Pa. 595, 187 A. 2d 586 (1963). As Judge Luongo of this court recently concluded, however, the two versions are "substan-

tially similar," and there is every indication that the new section 611 is now the law of Pennsylvania. *Mathis, supra,* 455 F. Supp. at 415-16. Indeed, insofar as the old section 611 provided for a privilege concerning "publication of a report of . . . proceedings of a[n] . . . administrative body or an executive officer of the United States," it seems that the two versions are, under the circumstances of the case at bar, functionally identical.[2]

The privilege contained in section 611 thus should be regarded as the law of Pennsylvania, which this court is bound to follow in this diversity libel action. *See Byrd v. Blue Ridge Rural Elec. Corp., Inc.,* 356 U. S. 525 (1958); *Hartman v. Time, Inc.,* 166 F. 2d 127 (3d Cir.), *cert. denied,* 334 U. S. 838 (1948). Moreover, the question of whether a privilege exists presents an issue of law for the court to determine. *See Sciandra, supra* at 606; Restatement (Second) of Torts § 619. I believe, therefore, that it is appropriate to consider the issue of privilege on the present motion for summary judgment.

The "official reports" privilege contained in section 611 has so far been applied by Pennsylvania courts only to records that are available to the public; its applicability to non-public records has not yet been tested. Two cases

2. Section 611 of the original Restatement provided in full:

> § 611. Reports of Judicial, Legislative and Executive Proceedings.
>
> The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is
>
> (a) accurate and complete or a fair abridgement of such proceedings, and
>
> (b) not made solely for the purpose of causing harm to the person defamed.

applying Pennsylvania law have unambiguously held that the privilege attaches to official reports that are intentionally released to the press. In *Sciandra v. Lynett, supra,* defendant newspaper published certain defamatory and/or false material about the plaintiff—material that had been directly derived from a report of an official state investigation into a number of suspected organized crime figures.[3] The report had been publicly released to the press three weeks earlier. Citing the original section 611, the Pennsylvania Supreme Court held that "[u]pon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government." *Id.,* 409 Pa. at 600, 187 A. 2d at 588. The court further held that the newspaper had done nothing to abuse the privilege, *i.e.,* by publishing something less than a substantially accurate account of the official report, or by publishing it solely for the purpose of causing harm to the person defamed. *Id.*

The other Pennsylvania case upon the subject of publicly released official reports is *Mathis v. Philadelphia Newspapers, Inc., supra.* In that case, defendants published information and a photograph supplied by the Philadelphia Police Department and the FBI, erroneously identifying the plaintiff as one of two suspects in a recent bank robbery. This court, per Judge Luongo, declined to hold that it was reasonable and non-negligent, as a matter of law, for defendants to have relied upon the accuracy of a photograph supplied by the FBI. The question of whether that reliance was reasonable enough to avoid liability for defamation, he concluded, presented a triable issue of fact

3. One of the individuals prominently mentioned in the report (the famous so-called "Reuter Report" of 1958) and the newspaper article was, coincidentally, Russell Bufalino.

for the jury. *Id.*, 455 F. Supp. at 414-15. Nevertheless, he found that the photograph and accompanying information that had been released by the police to the news media constituted an "informal" governmental report, within the ambit of the privilege contained in the new section 611. He added that under the Restatement formulation, the privilege "exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false." *Id.* at 417, *quoting* Restatement (Second) of Torts § 611, comment a (1977). *Accord*, Restatement, Torts § 611 (1938). The opinion echoed the holding of the *Sciandra* case that the privilege remains a qualified one, and may be lost if abused through inaccurate publication of the official report or through publication made solely for the purpose of causing harm to the person defamed.

The documents concerned in the present case are, like the defamatory material in *Mathis*, official FBI documents. This much at least, as noted earlier, is adequately established by the Breen and Collins affidavits. In addition, the documents, like the report in *Sciandra*, relate to matters of great public interest concerning organized crime, and, in the present case, concerning the possible relationship between organized crime and an elected member of Congress. Thus, if it were to appear that these documents had been, like the official reports in both *Mathis* and *Sciandra*, properly released by the government to public use, then under the rule of those cases, they would be privileged.

It does not clearly appear on the present record, however, that we are dealing here with public documents. There is no indication one way or the other as to how these FBI materials came into the hands of the individuals responsible for preparing the magazine article in question. Thus, it is appropriate to give plaintiff, for summary judgment purposes, the benefit of the doubt on this issue, and

to assume that the documents were secret and that their release to the defendant was unauthorized. Upon this assumption, therefore, the controlling question in this case is whether the section 611 privilege extends to documents which have never been intentionally released to the press or the public, but which have come into the defendant's hands only by way of an unauthorized news leak or some unlawful act.

The first place to seek guidance upon this issue, of course, would be the Restatement itself. Certainly, nothing in the text of section 611 precludes the possibility that the privilege applies to non-public as well as public reports. It is stated simply that the privilege applies to "a report of an official action or proceeding." The term "official action" is defined, in comment d, to include any "report by an officer or agency of the government." In contrast, it should be noted that when the privilege is asserted as to reports of *non-official* proceedings, the Restatement unambiguously requires that such proceedings be open to the general public and deal with matters of public concern. Restatement (Second) of Torts § 611 and comment i. Indeed, the Restatement simply reflects the lack of authority upon the issue, when it states, in comment d to section 611, that "[i]t is not clear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law."[4]

Similarly, the Pennsylvania Supreme Court in the *Sciandra* case has offered no guidance upon the public/

4. This last phrase, "available to the public under the law," would appear to be a reference to legislation like the Freedom of Information Act, 5 U. S. C. § 552. For purposes of this summary judgment motion, it will be assumed that the documents here in question would not be available to the public under that statute, by reason of the exmeption contained in § 552(b)(7), relating to "investigatory files compiled for law enforcement purposes."

non-public reports dichotomy. The only rationale for the section 611 privilege mentioned by the *Sciandra* court is "that it is in the public interest that information be made available as to what takes place in public affairs." 409 Pa. at 600, 187 A. 2d at 588. Under the circumstances of the *Sciandra* case, it seems clear that in speaking of "public affairs," the court was not attempting a determinative distinction between public and non-public official reports, but was simply equating the word "official" as used in section 611 with the notion of public business, in the sense that all official reports, whether made public or not, issue from the public sector rather than from private individuals and are therefore of general public concern. In any event, it seems to me that such dictum is sufficiently ambiguous to invite clarification from other sources.

Absent clarification under Pennsylvania law, it seems appropriate to seek guidance from the law—statutory as well as judicially created—of other states. One related area which has received a fair amount of judicial attention in other jurisdictions is the status, under the common-law official records privilege, of police reports and other preliminary investigations by law enforcement entities—matters not ordinarily made public. There is considerable authority to the effect that the republication of such reports is not privileged. *Yerkie v. Post-Newsweek Stations, Michigan, Inc.*, 470 F. Supp. 91 (D. Md. 1979); *Lancour v. Herald & Globe Ass'n*, 111 Vt. 371, 17 A. 2d 253 (1941); *Burrows v. Pulitzer Publishing Co.*, 255 S. W. 925 (Mo. App. 1923); *Williams v. Black*, 24 S. D. 501, 124 N. W. 728 (1910); *Billet v. Times-Democrat Publishing Co.*, 107 La. 751, 32 So. 17 (1902); *Jastrzembski v. Marxhausen*, 120 Mich. 677, 79 N. W. 935 (1899). *See* 53 C. J. S. *Libel and Slander* § 129. *See also Kelley v. Hearst Corp.*, 2 App. Div. 2d 480, 157 N. Y. S. 2d 498 (1956); *Nunnally v. Press Publishing Co.*, 110 App. Div. 10, 96 N. Y. S. 1042

(1905). These cases, however, were not decided upon the issue of whether the investigative reports were available to the public or not. Rather, the determinative question was whether the reports were sufficiently a part of the judicial process to bring them within the privilege to report judicial proceedings. The above state court cases concluded, fairly enough, that they were not.

The privilege to report judicial proceedings, however, is just one aspect of the privilege contained in section 611 of the Restatement. Other matters privileged under section 611 include reports of actions of executive officers, legislative proceedings, public meetings of a non-official nature, and quasi-judicial proceedings such as administrative hearings. Nevertheless, the tendency (only occasionally appearing in contemporary case law) to limit the privilege solely to its judicial application may be understood by reference to the fact that the judicial aspect of the privilege is older and more fully developed than any other. *See The King v. Wright,* 8 T. R. 293, 101 Eng. Rep. 1396 (1799); *Pittock v. O'Niell,* 63 Pa. 253 (1870); *Dorr v. United States,* 195 U. S. 138, 152 (1904); *Pulverman v. A. S. Abell Co.,* 131 F. Supp. 617, 622 (D. Md. 1955). *See generally, Barnett, The Privilege of Defamation by Private Report of Public Official Proceedings,* 31 Ore. L. Rev. 185 (1952); 5 Va. L. Rev. 513 (1918); W. Prosser, Law of Torts § 118, at 830 (4th ed. 1971). Therefore, cases excluding police reports from the scope of the judicial records privilege are not particularly helpful in the present case, where the applicable law of privilege, as embodied in section 611, encompasses far more than just records of judicial proceedings. In fact, as noted earlier, Judge Luongo of this district specifically held in the *Mathis* case that even such "informal governmental reports" as police dossiers on persons suspected of criminal activity fall within the section 611 privilege. 455 F. Supp. at 416.

This is not to say, however, that the distinction, for purposes of a qualified privilege to defame, between public and non-public official action has not been explored by the courts. It has been addressed in a number of cases, always in the context of judicial proceedings, but never, as observed earlier, solely in the context of police reports or reports by other non-judicial official entities. The bulk of this case law comes from New York, where there has long been a statute governing the scope of the official reports privilege. Until 1956, the statutory privilege, contained in section 337 of New York's Civil Practice Act, applied to any "fair and true report of any judicial, legislative *or other public and official proceedings.*" (emphasis added). New York courts consistently found that this language meant quite plainly that the only judicial proceedings covered by the privilege were those that were both public and official. *See Kelley v. Hearst Corp., supra; Danziger v. Hearst Corp.*, 304 N. Y. 244, 107 N. E. 2d 62 (1952); *Nunnally v. Press Publishing Co., supra;* 43 A. L. R. 3d 634, 637, and cases cited therein. *Accord, McCurdy v. Hughes,* 63 N. D. 435, 248 N. W. 512 (1933).

In 1956, however, the statute was amended to delete the word "public." The remaining language now presents a codified version of the official reports privilege substantially similar to that contained in section 611 of the Restatement.[5] New York courts construing the new statute

5. The statute, presently codified as section 74 of New York's Civil Rights Law, provides in pertinent part:

> Privileges in action for libel
>
> A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial, proceeding, legislative proceeding or other official proceeding.

The only substantial difference between this provision and section 611 does not appear to be material to the present case. I

have extended its protection to reports of certain types of secret judicial proceedings. For example, in *Keogh v. New York Herald Tribune Co.*, 51 Misc. 2d 888, 274 N. Y. S. 2d 302, *aff'd*, 28 App. Div. 2d 1209, 285 N. Y. S. 2d 262 (1966), the privilege was extended to secret grand jury proceedings. The court indicated in that case that the secrecy of grand jury proceedings nevertheless remained intact, and that the abrogation of defamation liability in that context was independent of existing punitive sanctions for violation of that secrecy. In *Shiles v. News Syndicate Co.*, 27 N. Y. 2d 9, 313 N. Y. S. 2d 104, 261 N. E. 2d 251 (1970), *cert. denied*, 400 U. S. 999 (1971), although the New York Court of Appeals declined to extend the privilege to secret records filed in matrimonial actions, it nevertheless recognized that the amended statute was meant to apply "to certain quasi-judicial and nonjudicial proceedings—such as those conducted by administrative agencies—which are not generally considered to be 'public' in nature or which might not be open to the public." 27 N. Y. 2d at 17, 313 N. Y. S. 2d at 110, 261 E. D. 2d at 255.[6] In *Gardner v. Poughkeepsie News-*

5. (Cont'd.)

refer to the fact that the Restatement privilege is considered to be abused where the republication is solely for the purpose of defaming the plaintiff. The New York version contains no such qualification, and thus appears to be more of an absolute privilege.

6. It could in fact quite easily be argued that the *Shiles* court was mistaken in imposing any restriction at all upon the privilege. In the first place, the language of the statute in and of itself could arguably have been sufficient to decide the issue. The statute expressly and unambiguously extends the protection of the privilege to "*any* judicial proceeding," without hint or mention of any distinction between public and non-public proceedings. Secondly, even if it could be said that the statute is ambiguous upon this point, the proper place to seek clarification would have been the legislative history of the statute during the process of its enactment, not the post-enactment comments of the state's chief executive

papers, Inc., the privilege was extended, upon the authority of the *Keogh* case, to sealed court records of juvenile proceedings.

The consensus of New York law thus would appear to support an expansive reading of section 611 in the present case, affording the protection of the privilege to non-public as well as public official reports. *Accord*, La. Rev. Stat. Ann. § 14:49 (1974) ("public *or* official proceeding").

Common-law authority from other states is not quite so helpful. Of the few older decisions—those dating back to the turn of the century—involving claims of privilege as to secret court documents, none focused clearly on the public/non-public distinction as a critical point. *See* 43 A. L. R. 3d 634, 641, and cases cited therein. One recent federal decision, however, contains the following language:

> If the information is contained in public records and derived from therein, there is an absolute privilege to publish. If, however, material is received from other than the public record, then the defendant newspaper

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6. (Cont'd.)

officer. If the legislative history had been consulted, it would probably have appeared, as the three-judge *Shiles* dissent observed, that the privilege was meant to be unrestricted, especially in light of the fact that an amendment specifically excluding matrimonial actions from the scope of the privilege had been "defeated overwhelmingly" by the legislature. Finally, it is quite possible that the Governor's comments were misconstrued. In his memorandum of approval, appended to the *Shiles* decision, he observed that the amended statute "would make it possible to publish, as in a newspaper, *a report of a judicial*, legislative or other official *proceeding even though it is not public*," while simultaneously stressing the continuing validity of the state's various secrecy provisions. 27 N. Y. 2d at 24, 313 N. Y. S. 2d 115-16, 261 N. E. 2d at 259 (emphasis added). As will be discussed more fully hereinafter, these two considerations are separate and distinct, and not at all inconsistent or requiring reconciliation. *See* pp. 17-18 *infra*.

assumes the risk that the information is incorrect. *Times-Dispatch Publishing Co. v. Zoll*, 148 Va. 850, 139 S. E. 505, 507 (1927).

Mills v. Kingsport Times-News, 475 F. Supp. 1005, 1011 (W. D. Va. 1979). Although this language seems to urge fairly unambiguously a distinction between public and non-public records, the circumstances of the case indicate that this was dictum only, not entitled to any significant precedential weight upon the present issue. The applicability of the privilege in the *Mills* case did not depend upon whether the records were public or not—for the court expressly noted, at page 1011, that they undoubtedly were. Rather, the central issue concerning the applicability of the privilege was whether the defendant had colored its reporting with information not appearing on the record of the judicial proceeding in question, and had thereby published something other than an "impartial and accurate account of the event." *Id.* Similarly, in the *Times-Dispatch* case relied upon by the *Mills* court, the issue was whether the privilege had been abused by inaccurate reporting of the official proceedings, rather than whether the privilege, in cases of non-public proceedings, was applicable at all. Thus, although both courts spoke of the privilege only in terms of public records, such language does not appear in either case to be elevated to the level of a judicial holding, or intended to be dispositive of any issue before the respective courts. Moreover, even if such language had been intended to have the force and effect of law, the fact the Virginia has its own common-law privilege rather than subscribing, as Pennsylvania has, to the Restatement's, would suggest that such authority should have only minor persuasive effect upon the scope of the privilege under Pennsylvania law.

In considering whether Pennsylvania's common-law republication privilege is broad enough to apply to non-

public as well as public official proceedings, it is appropriate to take into account the public interest. As long as the privilege has existed, courts have recognized that its primary justification lies in serving, as the Restatement phrases it, "the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings." Restatement (Second) of Torts § 611, comment a. *See* The *King v. Wright*, 8 T. R. 293, 101 Eng. Rep. 1396 (1799); *Sciandra, supra* at 600, 187 A. 2d at 588. 77 Colum. L. Rev. 1266, 1269 (1977); 64 Colum. L. Rev. 1102, 1111-16 (1964); 31 Ore. L. Rev., *supra* at 189.

It is true that the United States Supreme Court has held that the fact that defamatory material is of great public interest is not enough to cloak it with a constitutional privilege. *See Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29 (1971) (plurality opinion); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). A defamation is privileged under the first amendment, the Court advises us, only when the plaintiff is some sort of public figure. *New York Times Co., supra. See, e.g., Hutchinson v. Proxmire*, 47 U. S. L. W. 4827 (1979); *Wolston v. Reader's Digest Ass'n, Inc.*, 47 U. S. L. W. 4840 (1979). Moreover, the Court has specifically declined to give constitutional dimension to the privilege to report judicial proceedings. *Time, Inc. v. Firestone*, 424 U. S. 448, 456 (1976). *Cf. Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975) (publication of public court records held privileged in action for invasion of privacy).[7]

7. Reference to the *Rosenbloom* and *Gertz* line of cases raises the interesting possibility that the publication challenged here might be protected by a state law privilege other than that contained in section 611. Shortly after the *Rosenbloom* Court held that the publication of matters of public concern was constitution-

Nevertheless, as a common-law principle of defamation, the official reports privilege not only exists, but appears to be universally accepted. It is appropriate, therefore, in defining the scope of the section 611 privilege, to refer to various public interest considerations, despite the relatively recent constitutional authority of the *New York Times/Gertz* line of cases.

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7. (Cont'd)

ally protected, the Pennsylvania Supreme Court did the same. *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A. 2d 357, *cert. denied*, 408 U. S. 930 (1972). The *Matus* court adopted verbatim, as the law of Pennsylvania, the constitutional holding of the *Rosenbloom* plurality (*i.e.*, that the publisher of a defamatory statement on a subject of "public or general concern" may be held liable only upon a showing of malice). *Id.* at 395, 286 A. 2d at 363. However, since the time that the *Rosenbloom* holding was rejected by the United States Supreme Court in *Gertz*, the Pennsylvania Supreme Court has not had occasion to reconsider its position in *Matus*. Thus, Pennsylvania is left with a state law privilege derived exclusively from a now-void constitutional principle, so that, as the Third Circuit Court of Appeals recently observed, "Pennsylvania's standard of liability for suits brought by 'private figure' plaintiffs is presently unsettled." *Steaks Unlimited, Inc. v. Deaner*, No. 79-1716, slip op. at 13 (3d Cir. Apr. 24, 1980).

The court of appeals in the *Steaks Unlimited* case did not resolve the issue (finding instead that the plaintiff was a public rather than a private figure), but noted that two federal district courts had addressed the question and had come to opposing conclusions. *Id.*, slip op. at 14 n. 35. *See Lorentz v. Westinghouse Elec. Corp.*, 472 F. Supp. 946 (W. D. Pa. 1979) (*Matus* rule still viable); *Mathis v. Philadelphia Newspapers, Inc., supra* (*Matus* did not survive *Gertz*). I endorse Judge Luongo's thorough and well-reasoned holding in the *Mathis* case, and must reject the opposing view, especially in light of the fact that the *Lorentz* court made only the briefest reference to the *Matus* decision and did not consider at all the impact of *Gertz*. I conclude, therefore, that the public concern privilege set forth in *Matus* would be, at the very best, a tenuous precedent for this court to rely upon in assessing the privileged status of the communication challenged here.

The brand of public interest emphasized by the Restatement—that the public should be informed as to what occurs in official proceedings—does not logically diminish simply because the proceedings are conducted behind closed doors.[8] Although a legislative or executive determination that certain official matters should be kept secret certainly affects the public's right of access to those matters, it does not necessarily dampen the public's concern about them, or the public's need to be informed about the affairs of its governing bodies. The actions or proceedings of government, whether conducted in public or not, are performed by public employees, financed with public funds, and carried out, at least ostensibly, in the name of the public good. All, therefore, fall within the scope of the public interest implicated in the section 611 privilege.

The facts of the present case demonstrate especially compellingly the inappropriateness, in terms of the public interest, of a distinction between public and non-public official actions. The ultimate focus of the Time magazine article in question was the possibility of unethical or criminal activity on the part of Daniel Flood, an elected United States Congressman. The article raised the possibility

8. One writer has gleaned from the case law, in addition to this so-called "informational rationale," two alternate rationales for the republication privilege: a "supervisory rationale," whereby the public is considered to have the right to oversee the conduct of public officials, the more readily to hold them accountable therefor; and an "agency rationale," whereby the press is considered to be the eyes and ears of the public, entitled to observe whatever any member of the public, if he had the time or inclination, might observe. 64 Colum. L. Rev. 1102 (1964). These two rationales would arguably not be compatible with an interpretation of the republication privilege as applying to nonpublic matters. However, since neither of these rationales is implicated in the language of the Restatement or Pennsylvania case law, they need not be given any weight in the present discussion.

that there might have been ties between Representative Flood and organized crime, and that the plaintiff might have served as some sort of link between the two.[9]

The conduct of elected officials under our democratic form of self-government is of course a subject of paramount public concern; the law of defamation, especially in the constitutional context, has often deferred to it. *See New York Times Co., supra*; *Edwards v. National Audubon Society, Inc.*, 556 F. 2d 113, 122 (2d Cir.), *cert. denied*, 434 U. S. 1002 (1977). The infiltration of organized crime into various aspects of modern society is also a subject of enormous public concern. The problem has been specifically addressed by the Congress that enacted the Organized Crime Control Act of 1970, as evidenced by the Congress' accompanying finding that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption." [1970] U. S. Code Cong. & Admin. News 1073.

In addition, we must consider the difficulty of gathering information pertaining to organized criminal activity. Due to the size, sophistication and secrecy of most organized criminal endeavors, only the largest and most sophisticated intelligence-gathering entities can monitor them effectively. In practice, this task has been taken up primarily by the Justice Department of the federal government and, in particular, by the FBI. Thus, when the press

9. Representative Flood, it should be noted, pleaded guilty on February 26, 1980 to a single charge of conspiracy, pursuant to a plea-bargaining agreement. He had been charged with bribery and perjury, *e.g.*, through accepting more than $50,000 in return for using his influence as chairman of a congressional committee. Reuters Ltd. Wire Service, Feb. 26, 1980.

receives information compiled by the FBI relating to organized crime—whether through authorized, official channels, through an unauthorized news leak, or even through some unlawful activity—the press can fairly presume that such information was compiled in at least as competent and responsible a manner as any other information upon the subject. To require the press to obtain independent corroboration of such information, when the information is known to have been compiled by the largest law enforcement agency in the country, with particular competence in the area of organized crime, would, I believe, impose far too heavy a burden upon the much-protected freedoms of the press and the derivative right of the public to receive information upon issues of great moment. As the Pennsylvania Supreme Court stated in *Sciandra, supra,* 409 Pa. at 607, 187 A. 2d at 592:

> [T]o impose liability upon the defendant under the circumstances presented, would render, "Freedom of the Press" a lie, seriously impinge upon priceless constitutional guarantees and be a substantial deprivation of the public's right to know.

Consequently, I conclude that the mere fact that a government report has not been made public does not make it less of "a report of an official action or proceeding" than any other ex parte report of a governmental agency for purposes of the section 611 privilege to republish a defamation.

This is not to condone in any way, however, improper news-gathering techniques. We are concerned here with the press's right to *publish* information, not the right to *gather* it. These are two related but separable rights, of which the Supreme Court has stated: "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U. S. 1, 17

(1965). *See Lewis v. Baxley*, 368 F. Supp. 768, 775-76 (M. D. Ala. 1973); *Borecca v. Fasi*, 369 F. Supp. 906, 908-09 (D. Hawaii 1974). My ruling in this case deals only with the right of the press to publish certain information without fear of liability for defamation. It is not intended to alter the general rule that the press has no right of access to information not available to the public. *Trimble v. Johnston*, 173 F. Supp. 651, 655-56 (D. D. C. 1959). *See Branzburg v. Hayes*, 408 U. S. 665, 684 (1972); *Lewis v. Baxley, supra*, 368 F. Supp. at 776. Nor is it intended to diminish in any way the effectiveness of the various punitive sanctions available where there has been a breach of some legislative or executive decree of secrecy.[10]

Finally, some mention should be made of the exact scope of the section 611 privilege herein approved. It is of course a conditional privilege, and can be abused "by exaggerated additions, or embellishments to the account," and by publication "solely for the purpose of causing harm to the person defamed." *Sciandra, supra*, 409 Pa. at 600, 187 A. 2d at 589. It differs markedly from most other conditional privileges set forth in the Restatement and approved by Pennsylvania courts, in the following respect: under section 601 of the original Restatement, it was considered an abuse of most conditional privileges to publish the defamatory matter without reasonable grounds for believing it to be true. Section 611, however, was said to differ "from the usual conditional privilege in that it affords protection even though the defamatory statement reported is known to be false." Restatement, Torts § 611, comment a (1938).

10. This much appears to have been recognized by the New York courts in dealing with the amended New York privilege statute, as in *Keogh v. New York Herald Tribune Co., supra*, and by the Governor of New York, as noted earlier, in his comments in approval of that statute, quoted in the *Shiles* case.

The second Restatement retained the view of the first that most conditional privileges might be abused by some degree of awareness of the falsity of the publication on the part of the publisher, except that the negligence standard to which the publisher was held under the original Restatement was raised to a standard of recklessness, in light of the decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc., supra.* Even so, the new section 611 privilege remained a breed apart—"somewhat broader in its scope than the [other] conditional privileges" because of "the interest of the public in having information made available to it as to what occurs in official proceedings." Restatement (Second) of Torts § 611, comment a. *See id.* § 599, comment c; § 600, comment c; *Mathis, supra,* 455 F. Supp. at 417.

This appraisal of the standard of care applicable under section 611 might appear at first blush to be inconsistent with certain language in *Rosenbloom v. Metromedia, Inc.,* 403 U. S. 29 (1971). A plurality of the Supreme Court suggested by way of dictum in that case that Pennsylvania's section 611 republication privilege could be defeated, under Pennsylvania law, by mere negligence in failing to ascertain the truth of the matter. *Id.* at 38, *citing Purcell v. Westinghouse Broadcasting Co.,* 411 Pa. 167, 191 A. 2d 662 (1963). The language from the *Purcell* case cited by the Supreme Court, however, is not directly relevant to the issue of the degree of care that a defamation defendant should exercise under section 611 in ascertaining truth. The *Purcell* court appears to have been concerned with the degree of malice with which the defendant distorted and colored its account of the judicial proceedings, and simply did not address itself to the question of whether the defendant had any duty at all to ascertain the truth of the statements uttered in court. To the extent, therefore, that the *Rosenbloom* Court and the

Purcell court indicated that a negligent failure to ascertain the truth might defeat a conditional privilege, it is evident that they were referring not specifically to the section 611 privilege, but to conditional privileges in general. *See also Orr v. Dispatch Publishing Co.*, 65 York Leg. Rec. 129 (1951).

Thus, under the Restatement and Pennsylvania law, a defendant seeking the protection of the section 611 privilege is held to a sort of "super-malice" standard of care. The privilege that attaches to the publication of a fair and accurate account of an official action or proceeding is abused not by a negligent failure to ascertain the truth, or by a malicious failure to ascertain the truth, or even by unabashed *knowledge* of the falsity of the published account. It is abused, according to Pennsylvania law, only when publication is "solely for the purpose of causing harm to the person defamed." *Mathis, supra,* 455 F. Supp. at 417, *quoting Sciandra, supra,* 409 Pa. at 600, 187 A. 2d at 589.

It should also be noted that the privilege does not seem to apply when the defendant publishes the allegedly defamatory statements without attribution. In that situation, it has been said that "[t]he publication constitutes a charge by the person uttering it, and he is responsible therefor." *Hughes v. Washington Daily News Co.*, 193 F. 2d 922, 923 (D. C. Cir. 1952) (citations omitted). *See also Medina v. Time, Inc.*, 439 F. 2d 1129, 1130 (1st Cir. 1971) (in public figure libel context, test was whether defendant had asserted the truth of facts contained in the challenged statements); *Novel v. Garrison*, 338 F. Supp. 977 (N. D. Ill. 1971) (statement attributed to district attorney and not presented as defendant magazine's own opinion held not to demonstrate actual malice against public figure plaintiff). In the present case, much of the information was attributed to "Government investigators."

In the particular paragraph to which the plaintiff objects, it is stated simply that "*[i]nvestigators say* Bufalino frequently visited the Medico offices; *agents tape-recorded Bufalino's description* of Philip as a *capo* (chief) in his Mafia family." (emphasis added). From this language, it certainly cannot be said that the defendant was asserting the truth of the statements, or adopting as its own opinion whatever libelous innuendo is contained in the article.

Nor is there any indication whatsoever on the present record that defendant has otherwise abused the section 611 privilege, either by inaccurately reporting the information contained in the FBI documents, or by publishing the information solely for the purpose of defaming the plaintiff.

I conclude, therefore, that summary judgment should be entered in favor of the defendant, not on the basis of the asserted defense of truth, but on the basis of the common-law privilege contained in section 611 of the Second Restatement of Torts.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 79-597

PHILIP T. MEDICO

v.

TIME, INC.

ORDER

For the reasons set forth in the accompanying memorandum opinion, it is hereby ORDERED that summary judgment is hereby entered in FAVOR of defendant Time, Inc. and AGAINST plaintiff Philip T. Medico, and that plaintiff's corresponding "Motion for Denial of Summary Judgment" is accordingly DENIED.

By THE COURT:

(NAME ILLEGIBLE), *J.*

June 25, 1980.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 79-597

PHILIP T. MEDICO,

Plaintiff

v.

TIME, INC.,

Defendant

NOTICE OF APPEAL

FILED:

NOTICE IS HEREBY GIVEN that Philip T. Medico, Plaintiff above named, hereby appeals to the United States Court of Appeals for the 3rd Circuit from the final Order granting and entering Summary Judgment in favor of the Defendant, which Order was entered in this Action on the 26th day of June, 1980.

DATED: July 7, 1980

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2077

PHILIP T. MEDICO,

Appellant

v.

TIME, INC.

ORDER

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Hunter would grant the petition for rehearing.

By THE COURT,

ARLIN M. ADAMS, *Circuit Judge*

Dated: March 27, 1981

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PHILIP T. MEDICO,

Petitioner

v.

TIME, INC.,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this day of June, 1981, nine copies of the Petition for Writ of Certiorari were mailed by depositing same in a United States Post Office, first-class postage prepaid, addressed to Peter Hearn, Esquire, Pepper, Hamilton & Sheetz, 2001 The Fidelity Building, 123 South Broad Street, Philadelphia, Pennsylvania 19109, counsel of record for the respondent, in accordance with Paragraph 3 of Rule 28 of the Rules of the Supreme Court of the United States. I further certify that all parties required to be served have been served.

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Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
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No. 80-2168

IN THE

Supreme Court of the United States

October Term, 1980

PHILIP T. MEDICO,

Petitioner

v.

TIME, INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 80-2168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PHILIP T. MEDICO,

Petitioner

v.

TIME, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTION PRESENTED FOR REVIEW

Whether the Court should allocate its resources to review a United States Court of Appeals decision which interpreted state law, which decided no constitutional issue, and which does not conflict with any decision of any other court.

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Respondent Time Incorporated ("Time") opposes the Petition for Writ of Certiorari filed by petitioner Philip T. Medico. The petitioner has presented no special or important reasons for the granting of the writ. The decision he wishes the Court to review was squarely based upon a common law privilege which exists under the law of Pennsylvania. No question of constitutional magnitude is presented, and there is no conflict between federal courts of appeals respecting the matters decided by the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 643 F.2d 134 (3d Cir. 1981). That Court's order denying rehearing and rehearing *en banc* is mentioned at 643 F.2d 134, but is not officially reported as such.

The opinion of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of Time Incorporated is reported at 509 F. Supp. 268 (E.D. Pa. 1980). The previous opinion of the district court, denying Time's initial motion for summary judgment without prejudice to renewal of the motion, is not reported.

In all other respects, Time is satisfied with the petitioner's presentation of the opinions below.

JURISDICTION

Time is satisfied with the petitioner's presentation regarding the jurisdiction of this Court.

CONSTITUTIONAL PROVISION WHICH THE PETITIONER ALLEGES IS INVOLVED

The petitioner maintains on page 2 of the Petition that the First Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, is involved in this case. For the reasons set out below, Time disagrees. The basis for the decision of the Court of Appeals was a common law privilege existing under the law of Pennsylvania, and no constitutional question is presented by this case in its present posture.

STATEMENT OF THE CASE

This is a libel action which the petitioner filed in the United States District Court for the Eastern District of Pennsylvania on the basis of that court's diversity jurisdiction. Both the parties and the two courts below have applied Pennsylvania law to the dispute.

The petitioner alleged that he was injured by a small portion of a full-page article appearing in the March 6, 1978 issue of Time Magazine. Time had reported in that article on various official investigations of then-Congressman Daniel J. Flood of Pennsylvania. One segment of the article identified three specific situations that were being reviewed by government officials; the first of the three concerned potential links between Flood and Russell Bufalino, and it contained the statement on which Medico based his claim. That paragraph of the article, read in its entirety, is as follows:

> Among the matters under scrutiny:
>
> —Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino. The suspected link: the Wilkes-Barre

> firm of Medico Industries, controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

Only fourteen words in that paragraph—"agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family"—have been challenged by Medico in this litigation.

Time initially moved for summary judgment in June 1979, asserting that the words in question were substantially true and that truth is a complete defense under the law of Pennsylvania. In support of its motion, it submitted two official documents generated by the Federal Bureau of Investigation and an affidavit explaining the documents. The district court ruled in August 1979 that the affidavit submitted by Time was insufficient to authenticate the FBI records. It accordingly denied Time's motion, but without prejudice to its renewal if Time could obtain more complete affidavits. Appendix to Petition, at A38-A44.

In January 1980, Time once again moved for summary judgment, again on the state-law defense that the publication was true. Two new affidavits were presented, along with the same two FBI documents utilized by Time in connection with its initial motion for summary judgment. As he had in response to the first motion, the petitioner filed an affidavit which he believed was sufficient to cause the motion to be denied.

Upon its review of the record, the district court granted Time's renewed motion in June 1980. 509 F. Supp. 268 (E.D. Pa. 1980); Appendix to Petition, at A45-A71. Its ruling was not based upon the substantial truth of the publication, but rather upon the ground that the publication was privileged under section 611 of the *Restatement (Second) of Torts*, which furnishes a privilege to reports of official actions such as the FBI reports submitted by Time. Section 611 provides:

> *Report of Official Proceeding or Public Meeting*
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

The section 611 privilege is a state-law doctrine. "The privilege contained in section 611 thus should be regarded as the law of Pennsylvania, which this court is bound to follow in this diversity libel action." 509 F. Supp. at 272; Appendix to Petition, at A52.

On appeal, the Court of Appeals for the Third Circuit affirmed. 643 F.2d 134 (3d Cir. 1981); Appendix to Petition, at A1-A30. It approached the case from the same perspective as the district court had in its second opinion, ruling that the section 611 privilege would be adopted by a Pennsylvania court if the case had been brought in state court rather than in federal court under the diversity jurisdiction. "We believe it appropriate to accept as the law of Pennsylvania the version of the fair report privilege embodied in the current *Restatement*." 643 F.2d at 138; Appendix to Petition, at A10-A11 (footnote omitted). Following an extended analysis of the elements of the section 611 privilege and of their ap-

plicability to the facts of this case, the court concluded that the privilege protects the publication which the petitioner has challenged. "We conclude that Time's publication of an allegedly defamatory article concerning Philip Medico falls within the scope of the Pennsylvania common law privilege of fair report, and that Medico has failed to establish a genuine issue of fact concerning a possible abuse of the privilege." *Id.* at 147; Appendix to Petition, at A29-A30.

The court of appeals was quite clear throughout its opinion that the basis of its decision was Pennsylvania law. In addition to the conclusive statements quoted in the preceding paragraph, the court repeatedly relied upon decisions of Pennsylvania courts and of federal district courts which had construed Pennsylvania law. *See, e.g., id.* at 139-40; Appendix to Petition, at A13-A15.

After a thorough discussion of the policies underlying the common law privilege, the court referred to certain constitutional concerns. But it reached no holding on such issues; it only adverted to them as aids to its interpretation of Pennsylvania law. The court stated that constitutional values only "help resolve the present dispute" and "reinforc[e] our prediction that Pennsylvania would, as a matter of common law, apply the fair report privilege to Time's publication about Medico." *Id.* at 143; Appendix to Petition, at A20, A21. Even more explicitly, the court of appeals provided the following limitation on the scope of its decision:

> We are careful to point out that we *do not decide* at this time that the First Amendment immunizes a newspaper's republication of a defamation arising in connection with a matter of public interest, and originally authored by a government source.

Id. at 145; Appendix to Petition, at A26 (emphasis added).

SUMMARY OF ARGUMENT

This case does not present major questions of public importance. The decision which the petitioner has asked this Court to review was based upon the common law of Pennsylvania. Contrary to the petitioner's assertions, no question of constitutional magnitude is presented, and there is no conflict among the circuits on the issues which are properly presented by this case.

ARGUMENT

The petitioner has attempted to offer two separate reasons for the granting of the writ: that an important constitutional issue was decided by the court of appeals, and that its decision supposedly conflicts with decisions previously reached by the Courts of Appeals for the Second Circuit and for the Tenth Circuit.

The petitioner has misstated the basis of the court of appeals' decision. As demonstrated above, it was squarely grounded in state law, and no constitutional issue was decided. The petitioner is simply incorrect in his first argument, on pages 9 through 14 of his Petition, that the only "reasonable and meaningful" basis for the decision reached by the court of appeals was the constitutional privilege of neutral reportage. His path to that conclusion is tortured and wholly inconsistent with the court of appeals' decision. The court's references to constitutional principles were made only because they provided further guidance to a federal court in the process of determining how to construe a state-law doctrine—not because the court was determining an issue of constitutional law.

Contrary to the petitioner's argument, then, no constitutional issue is presented. *Cf. Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). It would thus be inappropriate for the Court to grant certiorari in this case. Even if a constitutional question were in the background of the case in its present posture, it could not be reached unless the state-law issue were first addressed and resolved against Time. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

The petitioner's second argument, which appears on pages 15 and 16 of the Petition, is built upon his first. He seems to assert that because he believes that the Third Circuit has recognized the constitutional doctrine of neutral reportage (his first point), there is now a conflict among the decision in this case, the Third Circuit's own earlier decision in *Dickey v. CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978), and the decisions in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied* and *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977). But because the court of appeals did not reach its decision on the basis of the doctrine of neutral reportage, no conflict among the courts of appeals can possibly be presented by this case. Even if it could be said that the court had reached the neutral reportage issue, its position would be consistent with *Edwards* and *Dixson* and not inconsistent with *Dickey*. *Dickey* was decided on a question of burden of proof and it never reached the neutral reportage privilege except in dicta.

CONCLUSION

There are no special or important reasons to grant the writ in this case. For all of the reasons set out above, Time urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 24, 1981

APPENDIX: Listing Prescribed by Rule 28.1 of the Rules of the Supreme Court of the United States

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent Time Incorporated, a corporation, identifies the following parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates:

American Cablevision of Fairfax, Inc.
American Cablevision of Indianapolis, Inc.
American Cablevision of Kansas City, Inc.
American Cablevision of Minneapolis, Inc.
American Cablevision of Pennsylvania, Inc.
American Cablevision of Philadelphia, Inc.
American Cablevision of St. Louis City, Inc.
American Cablevision of Wisconsin, Inc. ("ACW")

ACW Subsidiaries (partnerships)
Lakeside Cablevision
New Berlin Cablevision
Southwest Cablevision

American Heritage Cablevision, Inc.
Area Communications, Inc. of Florida
Center City Cablevision, Inc.
ATC Cablevision of Bellflower, Inc.
ATC Cablevision of Burlingame, Inc.
ATC Cablevision of East San Fernando Valley, Inc.
ATC Cablevision of Pasadena, Inc.
ATC Cablevision of San Gabriel, Inc.
ATC Cablevision of San Marino, Inc.
ATC Cablevision of Santa Ana, Inc.
American Television of Midwest City, Inc.
ATC Cablevision of South Pasadena, Inc.
Bartlesville Video, Inc.

Birmingham Cable Communications, Inc.
Cablevision of Durham, Inc.
Century Venture Corporation
Century-Colorado Corporation
Colorado Springs Cablevision, Inc.
Continental Cablevision of Richmond, Inc. of Virginia
Champaign-Urbana Communications, Inc.
Erie Telecommunications, Inc.
Frontier Cablevision, Inc.
Hawkeye Cablevision, Inc.
Honolulu Television and Communications Corporation
Inverness/ATC Joint Venture
Lakeshore Cablevision of Wisconsin, Inc.
Laurel Cablevision, Inc.
Memphis CATV Inc. of Tennessee
Mile Hi Cablevision, Inc.
Muscatine Television and Communications Corporation
New England Subscription T.V.
N. E. W. Media, Inc.
Norman Cable TV, Inc.
Lower Bucks Cablevision, Inc.
Private Channel Club of Miami
Public Cable Company
Sandhill Community Antenna Corporation
Select TV of California, Inc.
Subscription Television of Texas
Three Rivers Cablevision, Inc.
Tucson Cablevision, Inc.
Vista Cablevision, Inc.
West Allis Cablevision, Inc. of Wisconsin
Wolverine Cablevision, Inc.

Inland Container Corporation ("ICC")

ICC Subsidiaries

Georgia Kraft Company
JLW III

Temple-Eastex Incorporated ("T-EI")

T-EI Subsidiaries

Security & Guaranty Abstract Company
Temple-White Company, Inc.